Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TURBOMECA, S.A., and TURBOMECA ENGINE COMPANY,
Petitioners,

v.

KYONG JU BARNETT, Individually and as Guardian Ad Litem and Next Friend of JESSIE MORGAN BARNETT, and MIA KYONG BARNETT, minor children; JAMES S. BARNETT, SR.; WANDA BARNETT; and STATE OF MISSOURI,
Respondents.

On Petition for Writ of Certiorari
to the Missouri Court of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE MISSOURI COURT OF APPEALS' IMPOSITION OF $26,500,000 IN PUNITIVE DAMAGES VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE (a) PETITIONERS HAD NO NOTICE THAT MISSOURI WOULD EXACT SUCH A SEVERE PENALTY FOR THE FIRST INCIDENT OCCURRING IN THAT STATE, (b) THE CONDUCT PUNISHED OCCURRED ALMOST ENTIRELY IN OTHER STATES OR COUNTRIES, (c) THE PUNITIVE ASSESSMENT CONSTITUTES MORE THAN 21% OF ONE PETITIONER'S NET WORTH AND IS MORE THAN SEVEN TIMES THE OTHER'S NET WORTH, AND (d) THE SAME COURT AT THE SAME TIME IMPOSED AN ADDITIONAL $26,500,000 IN PUNITIVE DAMAGES AGAINST PETITIONERS IN A COMPANION CASE FOR THE SAME CONDUCT?

II. DID THE PUNITIVE DAMAGE ASSESSMENT VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT IN THAT 50% OF THE PUNITIVE DAMAGES, LESS FEES AND EXPENSES, IS PAYABLE TO THE STATE OF MISSOURI PURSUANT TO MO. REV. STAT. §537.675.2 (1994)?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Turbomeca, S.A. ("TSA"), and Turbomeca Engine Corp. ("TEC") hereby request this Court to issue a writ of certiorari to review the judgment of the Missouri Court of Appeals, Western District, entered in this case.[1/]

OPINIONS BELOW

The en banc opinion of the Missouri Court of Appeals, Western District, is reported at 963 S.W.2d 639 and is reproduced in the Appendix to this petition beginning at page A-1.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Missouri Court of Appeals, Western District, were filed on November 25, 1997. Petitioners filed timely petitions for rehearing and for transfer to the Missouri Supreme Court, which were denied by the Court of Appeals on January 27, 1998. Petitioners then filed a timely Application for Transfer in the Missouri Supreme Court, which denied discretionary review on March 24, 1998 (Apdx. p. A-56). This petition is being filed within 90 days of March 24, 1998. Jurisdiction in this Court is founded on 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Missouri Revised Statutes (1994):

Section 537.090. "Damages to be determined by jury — factors to be considered. In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus

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[1/] Pursuant to Supreme Court Rule 29.6, petitioners state they have no parent-subisidary relationship between themselves but are both indirect subsidiaries of Labinal, S.A., a French corporation. Neither petitioner has any subsidiaries that are not wholly owned.

occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable."

Section 537.675.2. "Fifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses shall be deemed entered in favor of the State of Missouri."

Section 510.263.4. "Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based."

STATEMENT OF THE CASE

Introduction

This is a civil action for wrongful death in which a jury in the Circuit Court of Jackson County, Missouri, returned a record-setting verdict against petitioners for $175,000,000 in compensatory damages and $175,000,000 in damages for "aggravating circumstances," or punitive damages. On petitioners' post-trial motions, the trial court ordered a remittitur of $150,000,000 in compensatory damages and $87,500,000 in aggravating circumstances damages, which remittitur was accepted by respondents. After crediting petitioners under Mo. Rev. Stat. §510.263.4 (1994) for $35,000,000 due to aggravating circumstances damages previously awarded in the companion case of *Letz v. Turbomeca, S.A.*, which arose from the same helicopter accident, the trial court entered a final judgment for $25,000,000 in compensatory damages, jointly and severally against the two petitioners, and for damages for aggravating circumstances of $45,000,000 against petitioner TSA, and $7,500,000 against petitioner TEC.

On appeal to the Missouri Court of Appeals, Western District, the court en banc rejected numerous assertions of trial error and affirmed the jury's finding of liability but determined that the damages, as remitted, were still excessive. The court decided that no more than $3,500,000 in compensatory damages was justifiable and that damages for aggravating circumstances, or punitive damages, should be remitted to $26,500,000.[2/] The court also decided the *Letz* appeal simultaneously and there entered a remittitur reducing the total award in that case from $70,000,000 to $2,500,000 in compensatory damages and another $26,500,000 in punitive damages.

[2/] The Court of Appeals' opinion, reported at 963 S.W.2d 639, is reproduced in the Appendix to this Petition.

Following the issuance of the opinions in both *Letz* and *Barnett*, petitioners filed timely Motions for Rehearing or to Transfer to the Missouri Supreme Court. Those motions were denied by the Court of Appeals. Petitioners then sought review in the Missouri Supreme Court by filing in that court Applications for Transfer. On March 24, 1998, the Supreme Court of Missouri accepted transfer in *Letz* but denied review in this case (Apdx. p. A-56). The mandate of the Court of Appeals thereafter issued in this case, and pursuant to that mandate, respondents accepted the remittitur in lieu of a new trial.

The trial court on remand joined the State of Missouri as a party because of its entitlement to share in the punitive damage award under Missouri law. An amended final judgment was entered on April 28, 1998. On the same day, petitioners paid the judgment, plus prejudgment interest of more than $10.5 million, under the threat of execution against the $134,000,000 supersedeas bond that had been posted in connection with the appeal. The final judgment, as paid, is reproduced at pages A-57 to A-64 of the Appendix.[3/]

Relevant Background Facts

The private respondents are the wife, parents and two children of James Barnett, Jr., who died May 27, 1993, when the Life Flight 2 helicopter he was piloting for Rocky Mountain Helicopters suffered an in-flight engine failure and crash landed in a field

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[3/] The ultimate paragraph of the April 28 judgment ordered that if petitioners did not "satisfy this final judgment in full on this date then Plaintiff's Motion for Execution of Judgment on Appeal Bond shall be sustained forthwith and Plaintiffs shall have and collect upon that judgment against St. Paul Fire & Marine Insurance Company" (Apdx. p. A-64).

near Cameron, Missouri. Pilot Barnett and a passenger, Sherry Letz, were fatally injured.[4/]

Petitioner TSA is a French company that manufactured a component part for Turbomeca engines known as the TU-76 nozzle guide vane ("NGV"). Petitioner TEC is a corporation located in Texas which sells and services Turbomeca engines in a territory that includes the United States. In June 1989, TEC installed a TU-76 in the module eventually used in the engine on the Life Flight 2 helicopter.

The evidence at trial showed that the TU-76 had been in worldwide service since 1982 and through the end of 1992 had logged approximately 3,000,000 hours of flight time (Ex. 8). Respondents established that TSA first became aware of a potential cracking problem in the TU-76 in 1986 and began research on a replacement NGV. Petitioner TSA sent a series of advisories to its customers notifying them to perform a compulsory check at least once a day for a rubbing noise in the gas generator assembly of any engine containing a TU-76 (Exs. 68, 69, 602, 603, 604).

Following three failed attempts to correct the problem with the TU-76, TSA in November 1990 eventually obtained certification from the French airworthiness authorities for the replacement TU-197 and TU-202 NGVs and began installing them at regular maintenance overhauls.

Internal records kept by TSA showed that during the 3,000,000 hours of flight time there had been only six prior in-flight engine stoppages, beginning in 1989, attributable to the TU-76 (Ex. 8, p.2). In those six incidents, two passengers were injured in 1989

[4/] The State of Missouri is joined as a respondent because it received proceeds of $4,742,199 from the punitive judgment pursuant to Mo. Rev. Stat. §537.675.2. References to "respondents" in this petition are to the private respondents.

in Bolivia, and three passengers were very slightly injured in a 1991 accident in Portugal (Ex. 269). No fatalities had occurred.

Other documents introduced by respondents suggested that there were additional incidents of cracking found in TU-76s beyond the six prior in-flight shutdowns shown by TSA's records. Even though some of those incidents did not involve in-flight stoppages and none of them produced injuries or death, respondents' theory of the case was that in reports to the FAA made *after* the Life Flight 2 accident, TSA did not list all previous incidents and thereby misled the United States Government and willfully endangered American lives. All the incidents cited occurred outside the State of Missouri and, for the most part, outside the United States.

Respondents' decedent was a 40-year-old pilot who was earning about $34,000 annually at the time of his death (Tr. 1239). Their damage expert calculated the economic loss to respondents at $649,080 (Tr. 1267, Ex. 285).

In urging the jury to find petitioners liable for punitive damages, respondents' counsel argued that TSA had supposedly saved $48,000,000 by not recalling the TU-76 worldwide and asked the jury to find that petitioners were guilty of conscious disregard for safety (Tr. 2658). Despite the fact that there had never been a previous fatal accident attributed to the TU-76, counsel told the jury that TSA had arbitrarily decided "who would be safe and would not be safe" (Tr. 2703). He emphasized that "they're still flying it around the world" (Tr. 2704) and argued that petitioners had lied about the number of prior incidents (Tr. 2704).

The determination of the amount of punitive damages was bifurcated. After the jury had awarded an astonishing $175,000,000 in compensatory damages, they were shown Exhibit 535A, which indicated that TSA's net worth was $122,565,470 (Tr. 2771). In his closing argument in the second

phase, respondents' counsel implored the jury to "send a message so loud and so clear and so strong that it makes the headlines of Paris, New York and London; United States jury puts their foot down. No more dangerous products in the United States" (Tr. 2775). Referring to gross sales figures, rather than net worth, he said, "They made half a billion dollars" and asked the jury to impose additional damages of $200,000,000 (Tr. 2776). After deliberating less than an hour, the jury returned additional verdicts for aggravating circumstances (punitive damages) of $150,000,000 against TSA and $25,000,000 against TEC (Tr. 2792-94).

Post-Trial Proceedings

The trial court remitted the verdict to a total of approximately $130,000,000 and applied a credit under Missouri law for the punitive damages previously awarded in *Letz*. Petitioners then appealed to the Missouri Court of Appeals, which heard both cases en banc. Petitioners had asserted their constitutional objections to the punitive damages award before the trial court in post-trial motions. See Joint Motion of Defendants Turbomeca, S.A., and Turbomeca Engine Corporation to Set Aside Verdict, *etc.*, filed Aug. 24, 1995, in Jackson County Circuit Court, No. CV93-24644, pp. 7-19, 69-79, and Suggestions in Support, pp. 16-36, 68-73. Those issues were also argued at length in Point IX of their brief to the Court of Appeals. See Brief for Appellants, No. W.D. 51980, pp. 85-97.

The Court of Appeals in *Barnett* rejected the numerous claims of error made by petitioners but concluded that the damage awards, even as remitted by the trial court, were still excessive. Emphasizing the problems experienced by the TU-76 in other states and countries, the Court of Appeals found that petitioners' conduct was "reprehensible," within the meaning of *BMW v. Gore*, 116 S. Ct. 1589 (1996), and that the total damages should be fixed, jointly and severally, at $3,500,000 compensatory and $26,500,000 punitive, or a new trial held on damages. At the

same time, the court affirmed the result in *Letz* but likewise remitted that judgment to $2,500,000 in actual damages and $26,500,000 additional punitive damages. The Court said that because the cases were being decided contemporaneously, the "credit" provision of Missouri law was not applicable, so that the total punitive damages payable by petitioners would be $53,000,000. See Apdx. pp. A-50 to A-54.

The Missouri Supreme Court granted petitioners' application for transfer in *Letz*, and that case is currently being briefed and will be argued in the fall of 1998.[5] Discretionary review in this case was denied by the Missouri Supreme Court on March 24, 1998, and after respondents accepted the remittitur, petitioners paid the judgment to prevent further accrual of nine percent (9%) interest and to avoid execution pursuant to respondents' "Motion for Execution of Judgment on Appeal Bond."[6]

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[5] The *Letz* opinion is not officially reported and was vacated by operation of law when the Supreme Court accepted transfer. It can be found at 1997 WL 727544.

[6] The fact that the judgment has been paid under threat of execution does not foreclose review by this Court. *Cahill v. New York, N.H. & H. R. Co.*, 351 U.S. 183, 184 (1956) (payment of money judgment does not render case moot); *Dakota Co. v. Glidden*, 113 U.S. 222, 224 (1885) ("[t]here can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money"). A payment is not voluntary if the defendant pays the judgment under threat of execution, *Rosenblum v. Jacks or Better of America West, Inc.*, 745 S.W.2d 754, 764 (Mo. App. 1988), or to stop the accrual of interest and costs, *United States ex rel. H&S Indus., Inc. v. F.D. Rich Co.*, 525 F.2d 760, 765 (7th Cir. 1975).

REASONS FOR GRANTING THE WRIT

I. THE MISSOURI COURT OF APPEALS' AWARD OF $26,500,000 IN PUNITIVE DAMAGES VIOLATES DUE PROCESS BECAUSE (a) PETITIONERS HAD NO NOTICE THAT MISSOURI WOULD EXACT SUCH A SEVERE PENALTY FOR THE FIRST INCIDENT OCCURRING IN THAT STATE, (b) THE CONDUCT PUNISHED OCCURRED ALMOST ENTIRELY IN OTHER STATES OR COUNTRIES, (c) THE PUNITIVE ASSESSMENT CONSTITUTES MORE THAN 21% OF TSA'S NET WORTH AND IS MORE THAN SEVEN TIMES TEC'S NET WORTH, AND (d) THE SAME COURT AT THE SAME TIME IMPOSED AN ADDITIONAL $26,500,000 IN PUNITIVE DAMAGES AGAINST PETITIONERS IN A COMPANION CASE FOR THE SAME CONDUCT.

This case presents important and recurring questions concerning the outer constitutional boundaries of punitive damages that were left open in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). The Missouri Court of Appeals imposed a $26,500,000 penalty on petitioners by way of remittitur under circumstances that should raise even the most inflexible of eyebrows. There are at least four due process problems with the punitive award that deserve this Court's attention.

A. Lack of Notice.

The entire statutory basis for the imposition of damages for "aggravating circumstances" in Missouri is contained in the ultimate sentence of Mo. Rev. Stat. §537.090 (1994): "The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts. . . ." Note that the word "damages" does not even appear in the text; yet this obscure and seemingly innocuous reference is the sole basis for the penalty imposed by the appellate court, which it fully equated

to punitive damages in accordance with the Supreme Court's holding in *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 467 (Mo. banc 1995). *See* Apdx. p. A-32 n.8.

At the time of the 1993 accident that gave rise to this case, "aggravating circumstances" had never played more than a *de minimis* role in Missouri Wrongful Death litigation. Indeed, the largest *total* award for any single wrongful death was $2,000,000 in *Goff v. St. Luke's Hospital of Kansas City*, 753 S.W.2d 557 (Mo. banc 1988), where the amount of damages was not contested on appeal. The largest judgment ever to survive an excessiveness challenge was $1,500,000, which was upheld in three different cases, *Blum v. Airport Terminal Services, Inc.*, 762 S.W.2d 67 (Mo. App. 1988); *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. App. 1986); and *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo. App. 1986).[7]

In *BMW*, 116 S. Ct. at 1604, this Court observed that due process entitles a defendant "to fair notice of the demands that the several states imposed on the conduct of its business." The French manufacturer TSA, in particular, had no business contacts with Missouri and may not even have been aware that any of its engines had found their way into Missouri. But even if it had diligently examined Missouri statutory and case law to assess the risks of doing business in that State, it would have had no conceivable reason to think that an obscure reference to "aggravating circumstances" that "may be considered by the

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[7] In the 1996 case of *Call v. Heard*, 925 S.W.2d 840 (Mo. banc 1996), the Supreme Court affirmed a punitive wrongful death award of $5,000,000 against an underage drunken driver who drank six packs of beer, crossed the center line in his pickup truck, and killed three persons. The defendant, who was convicted of three counts of manslaughter and sentenced to seven years in prison, did not argue excessiveness on appeal. Nevertheless, one of the dissenting judges said that the "size of the award shocks my conscience to such an extent that I deem it plain error . . . ." *Id.* at 855 (Blackmar, Sr. J., dissenting).

trier of the facts" could subject it to massive punitive damages. Nor would it have had any advance warning that if its first incident of product failure in Missouri produced a fatality, the penalty would be financially ruinous.

Under any rational formulation of "fair notice," this judgment is constitutionally infirm. The Court should grant review to afford guidance to the states about the warning required before a substantial confiscation of a nonresident's assets occurs.

B. Extraterritorial Punishment.

A major theme of respondents' case was that the TU-76 nozzle guide vane had experienced a number of problems beginning in 1986, resulting in some in-flight engine stoppages in various parts of the world, including the Congo, France, Bolivia, Arizona, California, Portugal, Guyana, and Brazil. *See* Apdx. pp. A-7 to A-13. There was no evidence that any other helicopter had suffered any damage in Missouri or that any person had been injured previously in Missouri as a result of an allegedly defective TU-76. *In fact, there was no evidence that any other helicopter had ever flown in Missouri with a TU-76.*

Nevertheless, even though the prior problems with the TU-76 had never caused a fatality and even though only five people had ever been injured in millions of hours of operations, respondents argued that petitioners should have recalled all engines around the world and that damages should be measured by the cost savings realized by not issuing such a recall. Respondents pegged this number at $48,000,000 by multiplying the supposed cost of a retrofit by the number of engines sold throughout the world. It was at least in part on this dubious and mathematically flawed exercise that the jury relied in fixing punitive damages at $175,000,000.

The Court of Appeals, in seemingly plucking $26,500,000 out of thin air as the remitted penalty amount, was obviously influenced by the jury's mammoth verdict and likewise made reference to the prior problems experienced worldwide and the fact that the engines were not recalled. Apdx. pp. A-39 to A-45. The court thus annointed Missouri the world's policeman and permitted it to extract recompense measured by all of petitioners' perceived worldwide transgressions. That was beyond its constitutional power.

In *BMW*, the forum state (Alabama) sought to impose punishment based on BMW's overall conduct, rather than limiting it to behavior that offended the laws or policies of Alabama or violated the rights of citizens of that State. The Court held that Alabama had no constitutional interest in punishing activity outside its borders — particularly activity that was legal where performed — saying that "the award must be analyzed in light of the [in-state] conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire nation." *BMW*, 116 S. Ct. at 1598. Thus, "it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanctions . . . ." *Id.* at 1598 n.21.

Moreover, respondents blatantly appealed to the jurors' xenophobic prejudices by arguing that petitioners discriminated against Americans and favored their French customers — particularly the French military — by giving them accurate information and free retrofits (Tr. 2703). Although those assertions were not supported by the record, respondents included these French transactions in compiling their inflated per-engine damage model. This, too, was foreclosed by *BMW*:

> "We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States." *Id.* at 1597.

Because this unprecedented punitive award for a single death bears no relation to petitioners' Missouri-based conduct, the Court should clarify and further delineate the sovereign interests of the several states that can constitutionally be vindicated by punitive damages.

C. Penalty as a Percentage of Net Worth.

The remitted punitive damage award imposed by the Court of Appeals, representing almost 22% of TSA's net worth, and 750% of TEC's, constitutes a confiscatory, arbitrary appropriation of petitioners' property. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (factors to be considered in determining excessiveness include ". . . (d) the 'financial position' of the defendant"); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995) (White, J., sitting by designation) ("wealth of defendant" is factor to be considered in determining reasonableness of punitive award under Due Process Clause). Although punitive-type damages are intended to sting, not destroy, *Dunn v. Hovic*, 1 F.3d 1371, 1404 (3d Cir. 1993) (Weis, J., dissenting), there can be little question that the jury intended to destroy these petitioners, as plaintiffs' counsel baldly encouraged them to do. It would seem too obvious for argument that seizing almost 22% of a defendant's net worth offends the Constitution, and an analysis of other cases confirms that conclusion.

The Eighth Circuit recently held that a punitive assessment of five percent of the defendant's net worth is *per se* excessive. *Equal Employment Opportunity Comm'n v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir. 1998). In *Cash v. Beltmann North American Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990), the court observed that a typical ratio for a punitive damage award to a defendant's net worth is about one percent. *See also Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (original $50 million punitive verdict reduced to $350,000, or 0.002% of defendant's net worth); *Ross v. Black & Decker*, 977 F.2d 1178

(7th Cir. 1992) ($10 million punitive judgment reduced to $5 million, or .25% of defendant's net worth), *cert. denied*, 507 U.S. 917 (1993); *Lipari v. Volume Shoe Corp.*, 664 S.W.2d 953 (Mo. App. 1983) (punitive damages award representing approximately .1% of defendant's net worth not excessive); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986) (two defendants; award represented 0.027% of their respective net worths), *cert. denied*, 478 U.S. 1022 (1986); *Spaeth v. Union Oil Co. of California*, 762 F.2d 865 (10th Cir. 1985) (0.06% of net worth), *cert. denied*, 476 U.S. 1104 (1986); *City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559 (D.S.C. 1986) (0.07% of net worth), *aff'd*, 827 F.2d 975 (4th Cir. 1987); *Bemer Aviation, Inc. v. Hughes Helicopter, Inc.*, 621 F. Supp. 290 (E.D. Pa. 1985) (0.21% of net worth), *aff'd*, 802 F.2d 445 (3d Cir. 1986). Since TSA's net worth at the time of trial was $122 million, any punitive component of the overall award exceeding about $1,250,000 is constitutionally suspect.

This Court's discussion of the elements of due process in *BMW* did not refer to net worth ratios because the assessment there was a comparatively modest $2,000,000 and the defendant corporation was an international behemoth. Not so here. The numbers in this case leave no doubt that the jury intended to put petitioners out of business. The appellate court's remittitur eased the burden somewhat, but the resulting judgment still constitutes an unconscionable confiscation of petitioners' property. Some further guidance is needed from this Court on the permissible limits of the role of state tort law in regulating and destroying a business — especially a foreign business.

D. Cumulative Punishment in Contemporaneously-Decided *Letz* Case.

The excessiveness of the punitive imposition in this case is exacerbated — indeed doubled — by the fact that on the same day this case was decided the Court of Appeals in *Letz* imposed

another $26,500,000 in punitive damages on these same respondents for the very same conduct involving the very same accident. Even though §510.263.4 of the Missouri statutes specifically requires a credit for punitive damages previously paid for the same conduct, the Court of Appeals ruled that the statute does not literally apply when two cases dealing with a single accident are decided concurrently, and further refused to reduce either judgment as a matter of constitutional law, saying:

> ". . . the court feels the overall effect of both cases and the remitted amounts of punitive damages in *each* case, when combined, reach the proper result and supply the relief that the credit statute envisions and the United States Supreme Court has enunciated: that total punitive damages, where there are successive suits, will not go beyond due process limits in punishment and deterrence." Apdx. p. A-53 (emphasis in original).

The Court then summarily concluded that $53,000,000 in aggregate punitive damages did not offend due process.

The Missouri court's logic is hard to square with any other case ever reported. We have already shown how the award in this case standing alone tramples on petitioners' due process rights. But instead of appropriating nearly 22% of TSA's net worth, the aggregate penalty takes 43%. There is simply no rational justification for the contention that punishment of this magnitude is necessary to get petitioners' attention and modify their behavior — minimal as it is — in Missouri. *See Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996) ($30 million punitive award was "far more than is necessary to secure [defendant's] attention and modify its behavior in Oklahoma" and was reduced to $6 million in light of *BMW* as the "maximum constitutionally permissible punitive award" where actual economic loss did not exceed $1 million), *cert. denied*, 117 S.Ct. 1846 (1997).

One of the factors to be considered in the excessiveness analysis is "the existence of other civil awards against the defendant for the same conduct." *Haslip*, 499 U.S. at 22. If those words have any meaning, they certainly prohibit the double whammy levied by the Missouri court in these two cases where (a) the total economic loss incurred by the two sets of survivors was $1.5 million, (b) the accident produced the first fatality in the history of this product, and (c) the effect on Missouri citizens was limited to the families involved in this accident.

According to the lesson derived from the Missouri court's opinion, if this accident had involved a commercial airliner with 200 passengers aboard, each set of plaintiffs would be entitled to punitive damages — and presumably in the same amount — as would every other family. This method of regulating conduct by judicial fiat assumes that punitive damages are a matter of right and that if some are good, more are better. On the contrary, they are a windfall to an otherwise fully compensated plaintiff, and once the defendant has been punished for certain conduct, the courts should be concerned with assuring adequate compensation for other victims of that conduct, not with equalizing the windfall among the various plaintiffs. Indeed, the approach taken below could well exhaust a defendant's financial wherewithal before some victims receive *any* compensatory awards.

The multiple punishments administered here magnify the due process problems and afford the Court an important opportunity to explain when enough is enough.

II. THE PUNITIVE DAMAGE AWARD VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

Under §537.675.2 of the Missouri statutes, fifty percent of any final judgment for punitive damages is payable to the State of Missouri and deposited in the Tort Victims' Compensation Fund.[8/] This provision was upheld against numerous state-law challenges in *Fust v. Attorney General*, 947 S.W.2d 424 (Mo. banc 1997). This participation of the State in 50% of the punitive damages also renders the punitive award unconstitutional under the Eighth Amendment to the United States Constitution, which prohibits "excessive fines."[9/]

In *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989), the Court held that the Excessive Fines Clause does not apply to damages in a civil suit "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." The Court thus reserved the question whether the Clause would be implicated where the government does participate in the recovery. But as Justices Stevens and O'Connor observed in their partial dissent in *Browning-Ferris*, the majority opinion in that case "suggests . . . that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a govern-

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[8/] Missouri is one of at least eight states which has legislatively determined that a portion of punitive damages is payable to the State. *See*, Alaska Stat. §09.17.020(j) (50%); Ga. Code Ann. §51-12-5.1(e)(2) (75%); Ind. Code §34-4-34-6 (75%); Iowa Code §668A(2) (75% where wrongful conduct not aimed at claimant); Kan. Stat. Ann. §60-3402(e) (50% in medical malpractice cases); Or. Rev. Stat. §18.540(1) (60%); Utah Code Ann. §78-18-1(3) (50% of punitive damages in excess of $20,000).

[9/] Petitioners' excessive fines argument was noted by the Missouri Court of Appeals (Apdx. p. A-5) but was not separately addressed in the court's opinion.

mental entity." *Id.* at 298-99 (O'Connor, J., concurring in part and dissenting in part).

Since *Browning Ferris*, it has become more apparent that the State's participation in a punitive award triggers application of the Excessive Fines Clause. In *Austin v. United States*, 509 U.S. 602 (1993), the Court applied the Clause to civil forfeiture proceedings because, whether the forfeiture is labeled "civil" or "criminal," it constitutes punishment of a party, which is the concern animating the Eighth Amendment. *Id.* at 609. Punitive damages, including damages based on "aggravating circumstances," are designed to punish and deter. *Bennett*, 896 S.W.2d at 468. There is no principled basis to differentiate between the forfeiture involved in *Austin* and civil punitive damages paid directly to the State. Hence, according to the rationale of *Browning-Ferris* and *Austin*, the Excessive Fines Clause applies to punitive awards under §537.675.2.

There can be little doubt that the $26,500,000 punishment imposed in this case is monstrously excessive. After deduction of all counsel's expenses and attorneys' fees, the State of Missouri received a check for $4,742,199 (Apdx. p. A-64). By contrast, if petitioners were prosecuted in Missouri for involuntary manslaughter, the maximum fine would be $10,000 each. *See* Mo. Rev. Stat. §560.021 (1994). The total fine imposed by the appellate court is 1325 times that amount and was assessed for civil. not criminal, wrongdoing.

We are not sure where lies the line of demarcation between appropriate and excessive fines, but surely it has been crossed here. When considered in light of the *BMW* factors, defendants' net worth, previous punitive awards in Missouri and elsewhere, and the elements identified in Justice O'Connor's separate opinion in *Browning-Ferris*, 492 U.S. at 301, the award reeks of excessiveness. In addition, the cumulative effect of the remitted assessment in *Letz* renders the *Barnett* judgment all the more

arbitrary and irrational. *See Colonial Pipeline Co. v. Wright Contracting Co.*, 365 S.E.2d 827 (Ga. 1988) ($5 million punitive damage award violated Georgia constitutional prohibition against excessive fines), *appeal dismissed*, 488 U.S. 805 (1988).

The Court should grant review to address the Eighth Amendment implications of a State's participation in an exorbitant punitive damage award.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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June 22, 1998

APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 51980

KYONG JU BARNETT, et al.,
Respondent-Appellant,
JAMES S. BARNETT, SR., and WANDA BARNETT,
Respondent-Appellants.

v.

LA SOCIETE ANONYME TURBOMECA FRANCE
A/K/A TURBOMECA, S.A.,
Appellant-Respondent,
TURBOMECA ENGINE CORPORATION,
Appellant-Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Lee E. Wells, Judge

OPINION FILED: NOVEMBER 25, 1997

Before: Ulrich, C.J., Lowenstein, Breckenridge, Hanna, Spinden, Smart, Ellis, Stith, Smith, Howard, JJ., and Berrey, Senior Judge.

This case, brought by survivors of the pilot in the same Life Flight helicopter accident which underlies the companion opinion handed down this day in *Letz v. Turbomeca Engine Corporation, et al.* W.D. #51446, was tried after the *Letz* case. The defendants have appealed on numerous grounds -- the plaintiffs cross-appeal on one point. The case was submitted to the jury on the theories of strict liability, negligence and failure to warn. *Letz* is being handed down simultaneously with this, the *Barnett* case, because the cases contain the same facts, similar and overlapping points and because the amount of punitive damages in the

previous case bears on the net amount of this award. This is an appeal by the same defendants in *Letz*, from the jury verdicts of $175 million actual damages and $175 million punitive damages which resulted in a trial court judgment, after remittitur, of $25 million actual and $87.5 million punitive arising from the wrongful death suit brought by the family of the pilot.[1] Therefore, this opinion will only briefly recite the relevant facts of the incident including factual and procedural details specific to this appeal. Additional facts will be included in the points to which they are relevant. This opinion will address only the points raised which are not resolved by this court's opinion in *Letz*.

GENERAL FACTS

On May 27, 1993, a single engine helicopter piloted by James Barnett, Life Flight 2, was transporting trauma victim, Sherry Ann Letz, from Maryville, Missouri to St. Luke's Hospital in Kansas City. En route, the helicopter engine suddenly failed and within ten to fifteen seconds crashed near Cameron. After the engine failed, Barnett maneuvered the aircraft some seventy feet beyond a stand of sixty foot trees, and crash-landed in a field. Four individuals were aboard the helicopter at the time of the crash: James Barnett, Jr., ("Barnett") the pilot; Sherry Letz, the trauma victim; Sheila Roth, a flight nurse; and Philip Hedrick, a respiratory therapist. Letz and Barnett were killed in the crash and the other two passengers were seriously injured. The crash was attributed to the failure of the TU-76 nozzle guide vane, in fact, Turbomeca finally admitted in their brief: ". . . there is no question in this case that the engine involved sustained an in-flight shutdown as a result of the failure of the TU-76 nozzle vane due to low stress thermal fatigue."[2]

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[1] There is a cross-appeal by the plaintiffs Barnett which relates to the amounts of the credit to be allowed on this judgment for the punitive damages assessed in *Letz*.

[2] For specific details explaining the TU-76 nozzle guide vane, the cause of the crash, and the reports generated by this accident, refer to *Letz v. Turbomecca Engine Corporation*, (slip opinion at pages 3-7).

The crash resulted in four separate lawsuits: the flight nurse and the respiratory therapist reached settlement agreements with Turbomeca, S.A., which designed and manufactured the helicopter, and Turbomeca Engine Corporation, a wholly owned subsidiary and distributor of the helicopter (hereinafter, the two defendant companies will be collectively referred to as "Turbomeca" and the American subsidiary, when standing alone, will be referred to as "Turbomeca Engine"). Letz's family filed a wrongful death action, and Barnett's family filed the wrongful death action here appealed. Again, in an effort to simplify the facts, Turbomeca shall mean *both* the defendant companies, and previous individual verdicts and judgments rendered against each of the two defendants shall be combined into one figure to represent the total judgment against "Turbomeca."

Barnett's immediate surviving family members who joined in the wrongful death action were: his wife of fifteen years, Kyong Ju ("Julia") Barnett; his fourteen-year-old son, Jessie; his twelve-year-old daughter Mia; and his parents, Wanda and James Barnett, Sr.

James Barnett died as a result of a transected thoracic aorta -- he bled to death in the helicopter within 3 to 5 minutes after the crash. On the date of his death, Barnett was forty years old and in generally good health. He was an experienced military and civilian pilot having completed Army flight school and helicopter training. He was also certified for commercial flights. Barnett was employed as a full-time Life Flight pilot for eight years prior to the accident and earned a salary of $34,000.00 annually. His life expectancy was an additional thirty-five years. Trial testimony indicated the purely economic damages suffered by Barnett's wife and children was $649,080.00. The amount of those damages is not contested.

Because this case was tried after *Letz,* the procedural aspects of the case are distinct. Specifically, the *Letz* trial was not bifurcated and the verdict on damages (originally $70 million)

was rendered in one lump sum which did not distinguish the amounts attributable to actual damages and punitive damages. This case was bifurcated as outlined in Section 510.263, RSMo 1994,[3] to distinguish the actual and punitive damages. A more detailed discussion of the statute is contained in Point 3, *infra.*

After a seventeen day jury trial, the jury returned a verdict of $175 million actual damages and $175 million punitive damages ($350 million total) in favor of Barnett's family. The verdicts were remitted by the trial court to $25 million actual damages and $87.5 million punitive damages ($112.5 million total). The trial court then issued a credit under Section 510.263.5 for the amount of punitive damages previously imposed by the trial court in *Letz*. Since the *Letz* verdict was not bifurcated, the court determined one-half of the $70 million total judgment was punitive and, accordingly, issued a $35 million credit. The Barnetts accepted the remitted award and the Second Amended and Final Judgment was entered awarding $25 million in actual damages and $52.5 million in punitive damages ($77.5 million total) allocated among the two named defendants.[4] Turbomeca appeals from this judgment and the Barnetts cross-appeal only on the matter of the credit based on the *Letz* punitive judgment.

Among the points raised in this appeal are several that are addressed and answered in this court's opinion in *Letz*[5]. Those points will not be directly dealt with in this opinion. The six points to be dealt with in this opinion are as follows:

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[3] All further statutory references are to the 1994 Revised Statutes of Missouri.

[4] The Appendix to this opinion presents a graphic summary of the dollar amounts awarded in the trial court and this court.

[5] Both, (1) the relevance of documents sent by Turbomeca to the FAA after the date of the accident, and (2) challenges to admission of deposition testimony of Dennis Nichols, president of Turbomeca Engine, regarding $48 million in cost savings for Turbomeca in not fixing the TU-76, were addressed in *Letz*.

1. Evidentiary questions involving: (A) pre-accident defects, and (B) whether Exhibit 111, an airworthiness directive, and Exhibit 177, an in-house letter on Turbomecca Engine letterhead suggesting the service bulletin was inadequate, should not have been admitted in evidence as they were evidence of post-accident subsequent remedial measures.

2. The trial court improperly instructed the jury in that: Instructions #25 and #27 did not instruct on proper mental state; Instruction #5 improperly defined "ordinary care"; and, Instruction #19 improperly withdrew an issue from the jury's consideration.

3. The trial court erred in refusing to allow the bifurcation process to be explained to the jury, and as a result, the jury was confused and misled.

4. The trial court erred in overruling defendants' objections to plaintiffs' admission of evidence of defendants' gross sales figures to support plaintiffs' claim for aggravating circumstances damages.

5. The trial court erred in denying defendants' motion for a new trial and refusing to enter a further remittitur of compensatory damages because the judgment as remitted, is grossly excessive, unsupported by the evidence, the product of counsel's misconduct and the jurors' bias, passion and prejudice, and bears no relation to damages authorized by Section 537.090.

6. The trial court erred in failing to grant a directed verdict (not preserved in *Letz)*, and denying defendants' motion for a new trial and refusing to further remit punitive damages because the judgment remains grossly excessive, the product of counsel's misconduct, constitutes an excessive fine under the Eighth

Amendment, denies defendants' due process and shocks the conscience of the court. Points 5 and 6 will be treated together as the final point on the Turbomeca appeal.

Finally, this opinion will address the Barnett cross-appeal on the proper net judgment amount for aggravating damages after calculation of the credit due from *Letz*.

SPECIFIC FACTS

The following is a timeline indicating the number and dates of all crash incidents involving the modified TU-76 and related Service Bulletins and Letters. It is presented to better acquaint the reader with the issues pertinent to this appeal.

Legend:

1. The chronology includes only incidents involving the *modified* TU-76 second stage nozzle -- the same defective product on the aircraft in this case. The original TU-76 was replaced by the modified TU-76 in the early 1980s, in order to gain a cost savings in production. The original component had not, prior to the modification, been implicated in any cracking problems or in-flight failures.[6] The later developed TU-202 ("Replacement") and TU-197 ("New") nozzles have not been implicated in any aircraft power failures.

2. Entries under "Information" are taken from internal Turbomeca reports or from testimony of its officials.

3. Entries involving this Life Flight helicopter are printed in bold.

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[6] This opinion will refer to the defective *modified* TU-76 as simply the TU-76, since the original TU-76 has never been implicated in any in-flight engine failures.

Year	Specific Date	Information
1985	June-July	Cracking problem discovered in TU-76 following accident, due to in-flight engine stoppage, in Congo. (1374 hours)(hereafter, where a number appears in parenthesis, that number indicates the number of flight hours between overhauls logged on that particular engine. **There were 2482 hours on the Life Flight helicopter in this case**). Turbomeca examines and determines the second stage problem came after cracking.
	September	Helicopter engine was returned by the owner to Turbomeca because of cracking found on the TU-76.
	October	Cracking incident involving TU-76 (940).
1986	January	1985 Congo accident involving a defective TU-76 reported to French DGAC and to French Military. DGAC is the French equivalent of the United States' F.A.A.. This information of a TU-76 problem was not given to the F.A.A., or other owners.
	January	Engine failure (1998)
		Engine failure (682)
	April	In-flight failure of engine (1148) in France, landed with some power. Turbomeca engineering report concludes a nozzle redesign is necessary and suggests overhaul of engine.
	June	Turbomeca conducts in-house testing of twelve second stage nozzles for cracking. The engineering report (Saviot) sent to the Executive Vice President, Chief of Engineering and ten others within Turbomeca, suggests the need to correct the cracking problem with TU-76, "caused by a low cycle fatigue stress of thermal

		origin. . . ." Preliminary conclusions point to poor design and poor manufacturing, and state that poor "machining process has been an aggravating factor." Research begins to correct problem.
	July	Follow-up to the June engineering report (Saviot) is sent to all high ranking Turbomeca officials, concluding modifications are needed to solve cracking problems which stemmed in part from "poor manufacturing quality of certain parts, and their improper stress level." Two 2nd stage nozzles were used in this test, one from a unit sold in January 1986 to Heli Union which had cracked after (682) hours and was described in the report as ". . . earliest cracked nozzle we have identified . . . " Turbomeca continues to manufacture engines with the modified TU-76 module.
	Year-end	In 1986 there were at least sixteen engines returned to Turbomeca because of cracking. Hours ranged from (682) to (2005).
1987		Testing for modifications to TU-76 continues.
	Year-end	In 1987 ten engines were returned to the manufacturer for cracking. Hours between overhaul were from (1156) to (2057).
1988		Testing for modifications continues, results yield "Replacement" (TU-202) (metal change) and "New" (TU-197) (change in shape).
	May	Turbomeca increases time between overhauls from 2000 to 2500 hours.
	Year-end	In 1988, fifteen engines were returned because of cracking, two were from the French police. Hours ranged from (455) to (2745).

1989 April — Turbomeca examines unit (865) from Germany which was returned because it suffered "seizing of axial compressor," with torn vanes and broken central hub on 2nd stage assembly. Conclusion: "We have registered up to now 3 cases of ruptures. . . ."

June — Engine (1015) failure, resulting in grave injuries to four individuals in Bolivia. Turbomeca exam by engineer Delbert finds rupture in 2nd stage turbine blades with deterioration of central hub and rupture of outer ring. Report sent to top executives.

June — **TU-76 installed in this helicopter during overhaul by Turbomeca Engine.**

October — Engineering Department of Turbomeca (Delbert) seeks approval of New (TU-197) part but a November notation states it is being "blocked by the Turbomeca's Commercial Department." After examining wreckage from the Bolivian crash, Delbert felt there was an urgent need to correct the TU-76.

November — Loss of power in a Phoenix TV station's helicopter caused an in-flight shutdown. The engine (1607) was examined and it was apparent the helicopter had a complete power failure over a busy freeway. Pilot successfully autorotated and landed in a field -- no injuries. Crack around 2nd stage of nozzle guide vane central box -- Turbomeca initially advises the owner that the warranty will not cover damage. Turbomeca relents and sends station another engine with the same TU-76 module.

December — Engine failure in flight - Hong Kong.

1990	January	Engineering memo to Commercial Department seeking "very urgent" approval of Replacement (TU-202) part.
	February	A helicopter engine (1639.7) suffers momentary deceleration in Oakland, as pilot hovered, prior to landing, after a round-trip flight. The pilot heard a loud, muffled explosion, power failure occurred, the aircraft yawed, pilot set up hovering autorotation, then engine power returned in 2-3 seconds, and the helicopter safely landed.
	May	Replacement and New parts completed and tested by Turbomeca.
	October	A confidential Turbomeca technical note (Delbert) on cracking nozzles listed three in-flight shutdowns (1015, 865, and 1602), and that twelve helicopters had been returned by owners because of cracking (all had between 500 and 2000 hours). At the time of the report, 427 engines had *not* been modified with the cheaper TU-76 -- of these engines with the *original* TU-76, none had been returned nor had been subject to an in-flight shut-down. 2105 of the modified variety existed, including those units that were sent back to Turbomeca or had shut-down in flight. This report was sent directly to the DGAC, but never supplied, even after the 1993 accident, to the FAA. This report stated the Replacement and New parts "... were developed to remedy this (cracking) problem."
	November	Turbomeca receives certification of New and Replacement parts from DGAC.
1991	January	Engine deceleration occurs in Oakland - no injuries sustained.

February — Replacement and New parts available to the 2,850 world-wide owners with TU-76, but no general recall is announced. Turbomeca never sent a notice to owners of aircraft with the modified TU-76 part that the New or Replacement components were available. French military were offered New and Replacement nozzles. Turbomeca makes a decision to replace TU-76 during the regular overhaul. (See May 1988).

March — First Service Letter sent to Owners who do not have Replacement, discusses checking for "abnormal noise during engine stop" to check. If owner hears a rubbing noise, it "may be due to a rubbing between the internal hub of the 2nd stage turbine nozzle guide vane and the rotating assembly." The owner was told if the rubbing noise has been loud, the part was to be removed. This was the first notice given to non-French owners of a TU-76 problem. It does not include in-flight failures of TU-76 to date, does not mention the cracking problem and does not mention that Replacement (TU-202) was to be installed at Turbomeca's cost.

June — In-flight shutdown in Portugal. Pilot and two passengers injured. (1354).

June — French military gives approval of New and Replacement parts.

1992 March — DGAC approval of Replacement part.

April — Service bulletin to American owners announcing availability of Replacement and New parts and recommending installation of either Replacement or New parts at time of regular overhaul. The degree of urgency of the Bulletin was listed as "optional." Levels go from most im-

portant, "urgent," down to "mandatory," "recommended," and finally, "optional."

November — In-flight shutdown during take-off in Australia. Engine (1455) examined by Turbomeca - indicates the cracks are due to friction and disconnection of TU-76 second stage nozzle guide vane.

December — Second Service Letter, to Owners who do not have New or Replacement parts, similar to March 1991 Letter (listen for noises).

1993 January — "Guyana" incident -- an in-flight engine shutdown (1401), after explosive noise. DGAC approval of New part.

February — Second service bulletin, similar to April 1992. The degree of urgency was "recommended." It stated the change to the Replacement part would take one mechanic two hours to install.

February 15 — Turbomeca inspects aircraft (1966) with 2nd stage nozzle guide vane damage, after in-flight failure preceded by several loud bangs and rapid loss of power (49%). Occurrence takes place on return portion of a round trip in Virginia. No injuries.

February 15 — Customer in Brazil sends helicopter engine (1669) to Turbomeca after in-flight stoppage.

April 13 — Third Service Letter. Turbomeca sends "Alert Information" service letter to Owners, "following an engine in-flight shut-down which occurred recently," warning to be aware of rubbing sounds. The word "mandatory" is used for all Owners who do not have the New or Replacement part. This is first reference in any correspondence by Turbomeca to an in-flight shut down.

May 22 — Turbomeca Engine finds 2nd stage problem (2011.5) after a pilot in Houston, Texas heard loud bang, no power loss occurred but while landing, the pilot heard a rubbing noise on coastdown.

May 26 — Phoenix TV station (see November 1989) helicopter engine (1894.9 hours on the replacement engine equipped with the TU-76) explodes five minutes after takeoff, yaws to right, pilot makes emergency landing with three passengers after a loss of power. Turbomeca Engine attempts to settle, but in letter sent to Turbomeca, says "I have tried to negotiate with this customer based on repairing his damaged engine which prices out at $178,000 for overhauls which I pro-rated to $134,000 based on the time of 1800 hours on the engine. He stated to me he did not want this engine back and wanted an offer on a new engine. I then offerred (sic) him a new 1B engine for $165,000 plus his old engine. He was insulted. He expects that based on his history of two engine problems for the same reason, we should be willing to show better faith and expects a new engine for free."

May 27 — **The Life Flight accident followed a "big, loud pop," then a clattering sound, then a horn indicating an engine failure which would not sustain the helicopter staying airborne.** Also on this date, a Turbomecca technical note distributed in-house concerned cracking on the TU-76 nozzle listed six previous in-flight shutdowns as of December 1992. An increase in "crack rate" over 1990 study. No cracks or shutdowns attributable to the Replacement or New parts.

May 27 — Turbomeca Technical Report (Delbert) saying, the crack occurrence may happen at any time

along the TU-76 nozzle's lifetime, and may well never happen. 75 of 98 nozzles with cracks examined by Turbo have 2000 hours, or less.

June — **Turbomeca letter to FAA stating this accident was the seventh incident/accident relating to the TU-76 nozzle. Reported numerous incidents of cracks found during repairs and overhauls, due to a design and manufacture defect that caused rubbing and stress. Appended Service Bulletins which disclosed to Owners that a visual inspection will not disclose cracks but deterioration may be indicated by listening for the rubbing noise while helicopter is on ground.**

June — **FAA report on this accident. (2482) hours on engine. Barnett had 4,970 flight hours of which 1,400 were from military. He had averaged 100 to 120 Life Flights a year for preceding 3 years. Pilot had not been trained in autorotation without power. Nurse on board was interviewed: Her statement indicated that 10-15 seconds from loud pop, then clattering noise, white light went on left side cockpit, pilot maneuvered "cyclic and collective," and pulled the nose up, then rear of copter struck earth. A witness reported seeing the helicopter just before the accident at 400-500 foot altitude.** Report also states "the crack may develop to a complete opening (failure), even if rubbing not detectable.

July — Turbomeca reports to DGAC. In July and August the DGAC issues Airworthiness Directive stating "Deteriorations . . . have resulted . . . in engine shutdowns." It makes mandatory the check of the module for rubbing noises.

December	Portugal, power loss, emergency landing during take-off.1994
February	Accident, following in-flight shutdown, Australia. Turbomeca tells FAA this was accident number 8 involving TU-76.
July	In-flight failure in Italy.

Other specific facts will be presented in the relevant Point Relied On. Again, the issues now presented are those not raised nor decided upon in *Letz*.

1. EVIDENTIARY QUESTIONS INVOLVING: A) PRE-ACCIDENT DEFECTS AND B) POST-ACCIDENT REMEDIAL MEASURES.

A.

Turbomeca now asserts that many of the memos and reports shown in the chronology of the facts should have been excluded on relevancy grounds. This case was submitted, in part, for recovery of actual damages in a product liability case, where the plaintiffs were required to show the product was defective and dangerous when put to a use reasonably anticipated by the manufacturer, and plaintiffs sustained damage as a direct result of the defect. For punitive damages, there had to be a showing that the defendant had actual knowledge of the defect and danger at the time the product was sold. *Angotti v. Celetox Corp.*, 812 S.W.2d 742, 751 - 52 (Mo. App. 1991). Turbomeca internal reports and the evidence of other crash information relating to this defective part went to show the danger of the product and to establish the defendant had actual knowledge of the danger. *Angotti*, 812 S.W.2d at 751 - 52.

B.

This point is a variation on Point V in *Letz*, the reasoning there is applicable here, so it will not be repeated. There is an additional reason for denial.

Exhibit 111 was an Airworthiness Directive issued in the summer of 1993 (see timeline) by the French DGAC and referred to the potential "worsening of this defect," and resulted in a more profound warning to owners of a defect that might cause in-flight shutdowns. Exhibit 177 was an internal Turbomeca memo in December 1993 in which the previous procedure to detect, listening for rubbing noises, was deemed not sufficient. Turbomeca correctly points out that evidence of subsequent remedial measures is inadmissible in negligence actions. *Pollard v. Ashby*, 793 S.W.2d 394, 401 (Mo. App. 1990). Turbomeca grudgingly admits, in a footnote at the end of it's Point Relied On, the existence of this court's opinion in *Stinson v. E.I. DuPont de Nemours and Company*, 904 S.W.2d 428 (Mo.App. 1995). In *Stinson*, under a strict product liability theory the plaintiff sought to introduce evidence showing the pre-injury warning label on the defendant's product said the product "could cause an allergic respiratory reaction," while the post-accident label "warned of the possibility of permanent lung injury." *Stinson*, 904 S.W.2d at 432. At page 432 this court said the post-accident rule in negligence cases did not apply ". . . in strict liability cases because: (1) the culpability of the defendant is irrelevant in such actions; and (2) the purposes of the rule would not be served."

In this case, where negligence and strict liability were both submitted, the post-accident evidence was relevant for one count, and, as long as it was not unduly prejudicial to Turbomeca, being relevant for one purpose but not another, the evidence was admissible. *Rodriguez v. Suzuki Motor Corporation*, 936 S.W.2d 104, 109 (Mo. banc 1996); *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 15 (Mo. banc 1994). If a defendant wishes to emphasize the limited purpose of the evidence, a limiting instruction may be requested. *Id.* A broad or blanket objection will not suffice when an exhibit is admissible for one purpose and not another. *Crockett by Crockett v. Schlingman*, 741 S.W.2d 717, 718 (Mo. App. 1987).

The point is denied.

2. INSTRUCTIONAL ERRORS: A) IN PROPERLY DEFINING DEFENDANT'S MENTAL STATE, B) IMPROPERLY DEFINING THE TERM ORDINARY CARE, AND C) WITHDRAWING AN ISSUE FROM THE JURY

A) Turbomeca asserts the exemplary damage instructions given by the trial court were improper as they did not adequately define, nor require a jury to find that "the defendant knew or should have known its conduct created a high probability of injury." The trial court utilized MAI 10.06 which is to be used in cases where exemplary damages are sought where both negligence and strict liability are submitted. MAI 10.06 states that if the jury finds that the acts set out in the plaintiff's negligence and strict liability verdict directors, "showed a complete indifference to or conscious disregard for the safety of others," then the jury could award punitive damages. Turbomeca here contends MAI instructions 10.02 (negligence) and 10.04 (strict liability) should have instead been given. There are several problems with this point. First, both MAI 10.02 and 10.04 contain the language "showed a complete disregard for the safety of others." While this is not exactly the same as the damage instruction given to the jury, the damage instruction given was so sufficiently similar to imply the same direction to the jury that any prejudice would be utterly minimal. Second, Turbomeca's point on appeal regarding the lack of definition as to scienter or conduct was not properly preserved. The objections at the instruction conference make no mention of this objection now raised on appeal. Turbomeca, in its reply brief, candidly admits any review would be under plain error. The admonition in *Fowler v. Park*, 673 S.W.2d 749, 757 (Mo. banc 1984) as to making the proper objection at the instruction conference, and the reluctance of appellate courts to reverse for errors in instruction without a substantial indication of prejudice, apply here. In addition, Rule 70.03 is clear --"No party may assign as error the giving or failure

to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection." Therefore, the court will not grant plain error relief.

B) The next assignment of instructional error concerns the definition of ordinary care. Turbomeca argued for MAI 11.05 which defines the degree of care required of a defendant as what "an ordinarily careful person would use . . . ." The court gave 11.10 II which ". . . means the degree of care, skill and learning that an ordinarily careful expert in defendant's business would use under the same or similar circumstances." Turbomeca states that all cases cited in the Committee Comment for use of this instruction for "Manufacturers of Certain Products," involve defendants who manufactured drugs. The argument is not persuasive. There was extended evidence offered from both sides as to the sophisticated nature of the engineering, dynamics, and production of helicopter engines. The trial court was justified in giving 11.10 II under these facts. Further, Turbomeca puts forth no showing of prejudice. This argument is denied.

C) Finally, Turbomeca disputes the trial court, pursuant to MAI 34.01, for giving a withdrawal instruction on evidence presented by Turbomeca that Rocky Mountain Helicopters had not performed so-called power checks or engine condition checks every 25 flying hours on the Life Flight's engine. These checks appear to be in the order of regularly scheduled maintenance on all aircraft as compared to the checks for rubbing noises as described in the service letters and bulletins. The trial court determined from the evidence that the performing of these particular checks would not have divulged anything relevant to the owner of impending power failure based on the *admitted* cause of this accident -- the defective TU-76. The purpose and use of withdrawal instructions is to avoid misleading a jury on a specious issue and the giving or refusing of these instructions is up to the discretion of the judge. *Bradley v. Browning-Ferris*

Industries, 779 S.W.2d 760, 765 (Mo. App. 1989). An abuse of the trial court's discretion is reviewed to determine whether the ruling is clearly against the logic of the circumstances and so arbitrary and unreasonable to shock a sense of justice, thus indicating a lack of careful consideration. *Shady Valley Park & Pool v. Weber, Inc.* 913 S.W.2d 28, 37 (Mo. App. 1995).

This point is denied.

3. TRIAL COURT FAILED TO ALLOW TURBOMECA IN ARGUMENT AND THROUGH INSTRUCTIONS TO ADEQUATELY EXPLAIN TO JURY THE TRIAL WOULD BE BIFURCATED.

Under the auspices of Section 510.263, Turbomeca invoked the option for a bifurcated trial.

> 1. All actions tried before a jury involving punitive damages shall be conducted in a bifurcated trial before the same jury if requested by any party.
>
> 2. In the first stage of a bifurcated trial, in which the issue of punitive damages is submissible, the jury shall determine liability for compensatory damages, the amount of compensatory damages, including nominal damages, and the liability of a defendant for punitive damages. Evidence of defendant's financial condition shall not be admissible in the first stage of such trial unless admissible for a proper purpose other than the amount of punitive damages.
>
> 3. If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant. Evidence of such defendant's net worth shall be admissible during the second stage of such trial.

When this statutory scheme is utilized in a suit involving punitive damages, the first phase of the trial calls for the jury to

first determine liability and the amount of compensatory damages, then liability for punitive damages. The second phase, if necessary, allows the jury to determine the amount of punitive damages.

Turbomeca does not claim instructional error such as a failure to use mandatory jury instructions or an improper amendment of jury instructions. Turbomeca here levels two complaints at the trial court for failure to heed the *suggestions* under MAI 35.19. MAI 35.19 contains a sample package of instructions for a trial involving punitive damages, and is contained in the "Illustrations" portion of MAI.

First, Turbomeca points to the following language in the Committee Comment to MAI 35.19: "The trial judge should exercise sound discretion in affording attorneys appropriate leeway during the various stages of trial to describe to the jury the proceedings contemplated by Section 510.263." Turbomeca's claim is that the quoted language is mandatory and should have been the authority to require the court to allow it to explain during voir dire, and in opening statement and closing argument that there would be a phase two and to emphasize the jury was not to award punitive style damages in phase one. The trial court did not allow Turbomeca to pursue this course.

Second, Turbomeca states the judge failed to include the proper and "mandatory" language contained in MAI 35.19: "If you find that defendant is liable for punitive damages in this stage of the trial, you will be given further instructions for assessing the amount of punitive damages in the second stage of the trial."

Turbomeca argues that both these errors constitute an abuse of discretion. The prejudice it claims is the $175 million verdict for compensatory damages. Turbomeca stresses that the jury failed to understand that the punitive damage portion of the trial was separate, and that it covered different damages. Appellate courts

hesitate to overturn an order of a trial court on matters resting within the discretion of trial court. *Forester v. Roddy*, 418 S.W.2d 67 (Mo. 1967). The decision to inform the jury of the technical workings of a bifurcated trial was an exercise of judicial discretion and will not be disturbed on appeal in absence of evidence of abuse thereof. *Arno v. St. Louis Public Service Co.*, 202 S.W.2d 787, (Mo.banc 1947).

The court can hardly be faulted for having given MAI instructions. It can not amount to reversible error in this case to fail to heed language in an illustrative instruction. *Northeast Missouri Electric Power Cooperative, v. Fulkerson*, 542 S.W.2d 26, 31 - 32 (Mo. App. 1976). Committee Comments are advisory not mandatory, and prejudice does not follow from a neglect to use them. *Sall v. Ellfeldt*, 662 S.W.2d 517, 524 (Mo. App. 1983). Although the court does not recognize reversible error here, certainly the better practice would be to more fully instruct the jury as to the bifurcated proceedings. Even if the jury was misled by the two-phase aspect of the trial, any prejudice is corrected by this court's action taken in point 5 on remittitur.

Turbomeca's claim that the compensatory damages were polluted with punitive damage evidence, is, however, worthy of further mention. Without unduly extending this opinion, a question may remain for legislative consideration. How much should the jury know, and at what stage in the trial should the defendant's conduct and the defendant's wealth be presented? Missouri's bifurcation process where punitive or aggravating damages are sought, is employed, with variations, in California, Georgia, Kansas, Montana, Nevada, New York, Tennessee, Utah and Wyoming.

What our system does is initially shield the evidence of the defendant's wealth from the jury, until there has been a determination that the defendant's conduct merits punitive damages. One commentator has mused, "It is a good guess that rich men do not fare well before juries, and the more emphasis placed on

their riches, the less well they fare." Morris, Punitive Damages in Tort Cases, 44 Harvard Law Review. 1173, 1191 (1931). Though evidence of wealth is delayed, our system allows the jury, in the first phase, to hear evidence on both the issues of liability and punitive damages. *Angotti v. Celotex Corp.*, 812 S.W.2d at 757. As earlier noted, it is only after hearing this evidence that the jury decides liability for compensatory damages, and renders a verdict as to whether to proceed to phase two to determine the amount of punitive damages. Combining a jury's determination of actual damages with liability for punitive damages, after hearing all the evidence on the elements of defendant's conduct, could lead to an inflated amount of compensatory damages. Some states, including Minnesota and North Dakota, have attempted to handle this situation by allowing only purely compensatory evidence at the first stage, then combining punitive damage type evidence and net worth in the second stage. This method does allow the jury to hear the wealth of the defendant along with examples of its conduct. Another alternative, which New Jersey used for a time, calls for a trifurcated proceeding, where compensatory damages are dealt with in the first phase, punitive type conduct is presented in the second phase to determine liability for punitive damages, and, then in the third stage, the defendant's net worth is presented and the amount of punitive damages is determined. Needless to say, the other methods are not without pitfalls and problems such as unduly prolonging a trial.

4. NET WORTH EVIDENCE

Turbomeca's next point asserts trial court error in the admission of evidence of its net worth in the second portion of the bifurcated trial where the jury was to consider the amount of punitive damages. Specifically, Turbomeca says Missouri law permits only evidence of the defendant's net worth, and allowing evidence before the jury of gross yearly sales is unrelated to "punitive-type damages."

Section 510.263, which deals with the procedure of a bifurcated trial where punitive damages are sought, first states in subsection two, "[E]vidence of defendant's *financial condition* shall not be admissible in the first stage. . . .," and then in subsection three, "If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant. Evidence of such defendant's *net worth* shall be admissible during the second stage of such trial." (Emphasis added). Turbomeca insists the reference to net worth evokes a legislative intent to limit evidence solely to a net worth figure, and use of any other financial evidence during this stage, is prejudicial error requiring reversal. The trial court allowed the Barnett plaintiffs to introduce two prior years' sales figures of the Turbomeca.

During discovery, Turbomeca submitted a financial report prepared for it showing a 1993 net worth of 591,255,863 francs which translated into $122,565,470. There was additional evidence of $200,369,360 as the net worth figure (assets minus liabilities) which was given to the jury and, over objection the reports 1992 and 1993 sales figures of $498,373,130 and $474,967,030 were allowed in evidence. Admission of the sales figures is at the heart of this point on appeal.

To support this point, Turbomeca relies primarily on *Gollwitzer v. Theodoro*, 675 S.W.2d 109, 111-112 (Mo. App. 1984). In *Gollwitzer* the Eastern District noted the *only* evidence offered by the plaintiff as to determining the proper measures of "affluence and wealth" of the defendant, consisted of gross sales and inventory taken from the defendant's prior tax returns. The opinion noted that admission of gross sales figures does not demonstrate that a profit was had, "and standing alone means nothing." *Id.* Similarly, the court noted inventory figures mean nothing without knowing whether goods on hand were mortgaged, or even if a large inventory equated to a lack of business.

Turbomeca's point that the only evidence relevant here is the net worth figure, is not well taken. This language from this court's decision in *Green v. Miller,* 851 S.W.2d 553, 555 (Mo. App. 1993) shows the law allows additional evidence other than the assets minus liabilities figure: "When determining the amount of punitive damages to be awarded, the worth or financial condition of the tortfeasor is a relevant consideration." *See also Call v. Heard,* 925 S.W.2d 840, 849 (Mo. banc 1996), where the Court referred to the "financial status," of the defendant as being relevant in determination of punitive damages); *Moore v. Missouri-Nebraska Express, Inc.* 892 S.W.2d 696, 674 (Mo. App. 1994). The law does not make irrelevant and inadmissible any evidence of the defendant's "financial status" other than the net worth figure. Under the proscription of Gollwitzer, there was sufficient evidence, including net worth, to support a jury determination of the extent of punitive damages necessary to punish and deter this defendant. The evidence here of sales was admissible, its weight was to be determined by the jury. The point is denied.

5. SUBMISSIBILITY AND AMOUNT OF COMPENSATORY AND PUNITIVE DAMAGES

The court now recites the standards for remittitur and determining excessiveness of damages under Section 537.090, Missouri's wrongful death act. This section shall apply to Turbomeca's request for new trial and further remittitur of the compensatory and punitive awards. In Missouri, there are generally two situations in which an appeal of an excessive verdict arises: (1) where the verdict is simply disproportionate to the proof of injury and results from an honest mistake by the jury in assessment of the evidence and, (2) where the verdict's excessiveness is engendered by trial misconduct and thus results from the bias and prejudice of the jury. A verdict in the first instance may be corrected by an enforced remittitur and does not require a retrial. A verdict of the second variety is prejudiced and can

only be remedied with a new trial. *Young v. Jack Boring's, Inc.*, 540 S.W.2d 887, 897 (Mo.App. 1976) (citation omitted); *Coulter v. Michigan Tire Corp.*, 622 S.W.2d 421, 436 (Mo. App. 1981), *cert. denied*, 456 U.S. 906 (1982).

Turbomeca argues that both the compensatory damages award and the punitive damages award were the product of trial misconduct and, thus, justify ordering a new trial. The points raised by Turbomeca to support its claims of misconduct are as follows: (1) plaintiffs improperly referred to cost-savings figure and the FAA reports; (2) plaintiffs employed improper videotaping techniques in depositions; (3) counsel's closing argument for plaintiffs was inflammatory and overly emotional; and (4) plaintiffs' counsel indicated to the jury that Turbomeca executives' deposition testimony was inferior to a personal appearance in court. Turbomeca's first claim of misconduct -- the referral to the cost-savings figure and the FAA reports -- was resolved in Letz, where this court held such evidence was relevant and admissible to show aggravating circumstances. The second, third, and fourth points raised, even assuming they amount to error or misconduct, are not, on appeal, so significant as to require a new trial.

Whether trial misconduct exists such that it engendered passion and prejudice on the part of the jury is left largely to the discretion of the trial court. *Walton v. U.S. Steel Corp.*, 362 S.W.2d 617, 627 (Mo. 1962); *Skadal v. Brown*, 351 S.W.2d 684, 690-91 (Mo. 1961). The trial court had every opportunity to see and observe the conduct of plaintiffs' counsel, and was aware of the circumstances surrounding counsels' actions as well as the general atmosphere of the trial. Based on its observations, the trial court ordered a remittitur of the verdicts, effectively ruling that any alleged trial misconduct did not warrant a new trial. This court sees nothing in this record to indicate that the trial court abused its discretion in failing to grant defendants a new trial because of the aforementioned incidents, whether such are

considered separately or cumulatively. Accordingly, with no trial misconduct by plaintiffs' counsel warranting a new trial, remittitur is an appropriate remedy.

The doctrine of remittitur has long been grounded in our common law. Although the Supreme Court of Missouri abrogated the doctrine in *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. banc 1985), Missouri's legislature reinstated remittitur soon thereafter. The remittitur statute, Section 537.068, was designed to establish equitable compensation and to eliminate, to the extent possible, the retrial of lawsuits. *Bishop v. Cummines*, 870 S.W.2d 922, 924 (Mo. App. 1994). Under Section 536.068, remittitur is proper only where, "after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict . . . exceeds fair and reasonable compensation for plaintiff's injuries and damages. . . ."

The trial court has broad discretion in ordering remittitur because the ruling is based upon the weight of the evidence, and the trial court is in the best position to weigh the evidence. *Magnuson by Mabe v. Kelsey-Hayes Co.*, 844 S.W.2d 448, 457 (Mo. App. 1992); *Fust v. Francois*, 913 S.W.2d 38, 49 (Mo. App. 1995). This court will interfere with an order of remittitur only upon a finding that both the jury's verdict and the trial court's ruling constituted an arbitrary abuse of discretion. *Hall v. Superior Chemical & Fertilizer, Inc.*, 819 S.W.2d 422, 425 (Mo. App. 1991); *See also Bishop v. Cummines*, 870 S.W.2d at 923. The trial court will be deemed to have abused its discretion where the remitted judgment is still so excessive as to shock the conscience of the appellate court. *Larabee v. Washington*, 793 S.W.2d 357, 360 (Mo. App. 1990); *See also Fust v. Francois*, 913 S.W.2d at 49 (Mo. App. 1995).

Missouri courts have consistently adhered to the rule that a verdict of a jury in assessing damages will not be disturbed unless it is grossly excessive or inadequate. *Sandifer v. Thompson*, 280 S.W.2d 412, 415 (Mo. 1955). In determining whether

a verdict is grossly excessive, the appellate court reviews the evidence in the light most favorable to the plaintiff. *Sandifer v. Thompson*, 280 S.W.2d 412, 416 (Mo. 1955). *See also Triplett v. Beeler*, 268 S.W.2d 814, 819 (Mo. 1954). The ultimate test is what fairly and reasonably compensates the plaintiff for the injuries sustained. *Coulter v. Michelin Tire Corp.*, 622 S.W.2d 421, 436 (Mo. App. 1981), *cert. denied*, 456 U.S. 906 (1982); *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1299 (8th Circ. 1987).

A. COMPENSATORY DAMAGES

The jury awarded plaintiffs $175 million in compensatory damages, which the trial court remitted to $25 million. Turbomeca appeals the remitted compensatory award claiming that the trial court erred in denying defendant's motion for a new trial and refusing to further remit the compensatory verdict. Turbomeca claims that the verdict, even as remitted is: (1) grossly excessive, (2) the product of misconduct by plaintiffs' counsel thus demonstrating bias, passion and prejudice of the jury; (3) shocks the conscience of the court, (4) exceeds fair and reasonable compensation, and (5) is unsupported by the evidence.

Turbomeca first requests that this court order a new trial arguing that such relief is warranted by the excessiveness of the verdict. Entitlement to a new trial based on the excessiveness of the verdict requires a showing of trial court error. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 872 (Mo. banc. 1993); *Larabee*, 793 S.W.2d at 359. The size of the verdict alone will not establish bias, passion, and prejudice of the jury. *Id.* The complaining party must show that the verdict, viewed in the light most favorable to the prevailing party, was glaringly unwarranted and that some trial error or misconduct of the prevailing party was responsible for prejudicing the jury.[7] *Id.*

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[7] See discussion *supra* for analysis of Turbomeca's claim of trial misconduct by plaintiffs' counsel.

There is no exact formula to determine whether a verdict for compensatory damages is excessive and, of course, each case must be considered on it own merits. *Larabee v. Washington*, 793 at 360, a personal injury case, indicates that in evaluating the excessiveness of an award, the reviewing court should consider the evidence in the case and the verdict in light of the following factors: (1) loss of income, present and future, (2) medical expenses, (3) [decedent's] age, (4) the nature and extent of the injuries, (5) economic factors, (6) awards given and approved in comparable cases, and (7) the superior opportunity for the jury and trial court to appraise [decedent's] injuries and other damages.

Guidance may also be taken from the Wrongful Death Act. The persons entitled to recover under the wrongful death statute are identified in Section 537.080.1(1) as the spouse, children, and parents of the deceased - all of whom were plaintiffs below. Wrongful death damages are governed by Section 537.090 which provides:

> [T]he trier of facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of services, consortium, companionship, comfort, instruction, guidance, counsel training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death . . . In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of facts, but damages for grief and bereavement by reason of death shall not be recoverable.

A factor to be considered in evaluating damages under the Wrongful Death Act is potential financial aid by the decedent, which can be shown through evidence of the decedent's health, character, talents, earning capacity, life expectancy, age and habits. *Kilmer v. Browning*, 806 S.W.2d 75, 81 (Mo. App. 1991). In computing the loss of consortium for the loss of a parent for a child, or the loss of a child for a parent, factors such as the physical, emotional, and psychological relationship between the parent and child must be considered. *Kilmer*, 806 S.W.2d at 81.

Any pain and suffering the decedent may have endured shall also be considered in determining damages. Section 537.090. The range between an inadequate award and an excessive award for pain and suffering can be enormous, each case depends upon its own particular facts. *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1301 (8th Cir. 1987). Substantial disparity among juries as to what constitutes pain and suffering must be expected. As the Eighth Circuit Court of Appeals stated,

> This is a litigious fact of life of which counsel, clients, and insurance carriers are fully aware. Once they place their fate in the hands of a jury, then they should be prepared for the result. . . .They cannot expect the [c]ourt to extricate them in all cases where the award is higher or lower than hoped for or anticipated.

Morrissey v. Welsh Co., 821 F.2d at 1301(citations omitted).

In light of these general principles of law, a review of the evidence favorable to the compensatory damage award is in order. The purely economic damages attributable to Barnett's death are undisputed, both sides agree that $649,080.00 represents the lost past and future earnings, benefits and household services related to James Barnett's death. As a result, the non-economic losses, when applying the trial court's remittitur of compensatory damages to $25 million, amount to $24,350,920.00 in non-economic damages. The non-economic losses for wrong-

ful death require this court to properly consider the reasonable value of services, consortium, companionship, comfort, instruction, guidance, counsel, training and support, as well as any pain and suffering which the deceased may have suffered. Section 537.090.

At the time of his death, James Barnett, Jr., was forty years old and was in good health. His life expectancy was an additional thirty-six years to age seventy six. His salary was approximately $34,000.00 annually. He was an excellent pilot by all accounts and had been employed as a full-time Life Flight pilot for eight years prior to his death. He received flight training in the military and was licensed for commercial flights. He had been married for fifteen years to Julia Barnett, whom he met during overseas military service. The couple had two young children, Jessie (14) and Mia (12), both of whom enjoyed a close relationship with their father. In addition, he had a close relationship with his parents James and Wanda Barnett. A videotape demonstrating the closeness and intimacy of interactions between James Barnett and his family was admitted into evidence.

Additional factors to consider include the pain and suffering of the deceased prior to death and the number of plaintiffs suffering a loss. Section 537.090. Testimony of the Chief Medical Examiner of Jackson County who performed the autopsy demonstrated that James Barnett consciously suffered pain for three to five minutes as he bled to death after his thoracic aorta was severed upon impact.

Plaintiffs properly point out that the compensatory verdict considers the economic and non-economic losses to five individual plaintiffs. "[A]n element of the total damages is based upon the relationship between the deceased and each individual party to the action." *Call v. Heard,* 925 S.W.2d 840, 851 (Mo. banc 1996). The fact that each of five individuals who were proper plaintiffs under the Wrongful Death Act demonstrated significant non-economic losses stemming from the death of

James Barnett would work to increase the total compensatory award. Under the authority of Section 537.068, and having reviewed and weighed the evidence of economic and non-economic compensatory damage and considering the number of plaintiffs, this court finds that the 25 million compensatory award remains excessive and finds that 3.5 million dollars is an appropriate compensatory damage award and orders remittitur accordingly, providing the plaintiffs accept this figure, otherwise a new trial will be ordered.

B. PUNITIVE DAMAGES

1) Refusal to Grant Directed Verdict

Turbomeca also alleges the trial court erred in refusing to grant a directed verdict on the issue of aggravating circumstances and in submitting the issue to the jury because plaintiffs failed to make a submissible case that: (1) Turbomeca knew of the defective condition of the TU-76 nozzle guide vane at the time the TU-76 left Turbomeca's possession; (2) Turbomeca knew or had reason to know of the high probability that its actions would result in injury; and (3) Turbomeca showed complete indifference to or conscious disregard for the safety of others when they sold or installed the TU-76 nozzle guide vane.

In reviewing the denial of a motion for directed verdict, the evidence presented at trial is viewed in the light most favorable to the non-moving party in order to determine whether or not substantial evidence was introduced which tended to prove facts essential to plaintiff's recovery. *Gamble v. Bost*, 901 S.W.2d 182, 185 (Mo. App. 1995); *Lindsey Masonry Co. V. Jenkins & Assoc.*, 897 S.W.2d 6, 15 (Mo. App. 1995). A case should not be withdrawn from the jury unless the facts in evidence and the inferences fairly deductible therefrom are so strongly against plaintiffs that reasonable minds could not differ. *Bridgeforth v. Proffitt*, 490 S.W.2d 416, 423 (Mo.App.1973).

Section 537.090 provides that in wrongful death cases "[t]he mitigating or aggravating circumstances attending the death may be considered by the trier of facts" in assessing damages. In *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 466 (Mo. banc 1995), the Supreme Court of Missouri held that aggravating circumstances damages in wrongful death cases are punitive in nature. Subsequently, in *Call v. Heard,* 925 at 847-849, Missouri's highest court applied a punitive damages analysis in reviewing an award of aggravating circumstances damages under Section 537.090, Missouri's wrongful death statute.[8]

The well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct. *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. banc 1986). Submission of punitive damages in a wrongful death case is proper when the defendant could have reasonably been charged with knowledge of a potentially dangerous situation but failed to act to prevent or reduce the danger. *Kilmer v. Browning*, 806 S.W.2d 75, 80 (Mo. App. 1991).[9]

In the context of products liability actions, the legal standard for submitting punitive damages depends on whether the underlying theory is in strict liability or in negligence. The trial court

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[8]In *Call v. Heard,* the Supreme Court jettisoned the term "aggravating circumstances damages" for "punitive damages," thereby solidifying its holding in *Bennett* that aggravating circumstances damages are the equivalent of punitive damages. *Baker v. General Motors Corp.*, 86 F.3d 811, 817 (8th Cir. 1996). Hence, this opinion, following the Supreme Court of Missouri's opinion in Call, refers to the Wrongful Death Act's aggravating circumstances damages as punitive damages.

[9]In *Kilmer v. Browning,* a wrongful death case brought against the landlord and gas company when a tenant died of carbon monoxide asphyxiation, the court held that failing to adequately examine a carbon monoxide venting system, or ignoring the system's defective condition, was indicative of indifference to the safety of others, and justified submitting punitive damages to the jury. *Kilmer v. Browning*, 806 S.W.2d at 80.

submitted both theories to the jury. Under a negligence theory, punitive damages may be awarded if the defendant showed complete indifference to or a conscious disregard for the safety of others. *Stojkovic v. Weller*, 802 S.W.2d 152, 155 (Mo. banc 1991) (citing *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 73 (Mo. banc 1990)). Missouri cases have interpreted "complete indifference to or a conscious disregard for the safety of others" to mean if the defendant knew or had reason to know that there was a high degree of probability that the action would result in injury. *Hoover's Dairy, Inc. v. Mid-American Dairymen,* 700 S.W.2d 426, 436 (Mo. banc 1985); *Sharp v. Robberson,* 495 S.W.2d 394, 397 (Mo. banc 1973). In a strict liability case, punitive damages are properly submitted where (1) the defendant showed complete indifference to or a conscious disregard for the safety of others, and (2) the defendant introduced the offending product into commerce with actual knowledge of the product's defect. *Angotti v. Celotex Corp.*, 812 S.W.2d 742, 746 (Mo. App. 1991).

A review of the evidence presented at trial reveals that substantial evidence existed from which the trial court could determine that plaintiffs had made a submissible case for punitive damages. Testimony by Turbomeca's own officers indicates complete indifference to, and a conscious disregard for, the safety of others. Jean Meliet, a mechanical engineer who has been Turbomeca's Customer Technical Support Manager since 1989, testified at trial that he knew in 1986 or 1987 that a problem caused by moving parts rubbing on non-moving parts were causing a deterioration that resulted in engine shutdowns. (See timeline, June 1986, Saviot report). He agreed that, in 1986, the Saviot report revealed a serious TU-76 problem. At trial, the following dialogue followed:

> Q. Now, notwithstanding the fact you know you have a serious problem with the TU-76, you still keep manufacturing ARRIEL engines with the TU-76 modifica-

tions in them without making changes; isn't that true, in design?

A. Yes.

Q. And you keep manufacturing them and selling them without changing the metal, correct?

A. Yes.

Q. And literally hundreds and hundreds of these engines with the weak metal get manufactured and sold after June 9 of 1986, correct?

A. Yes.

Q. And that goes out on new aircraft and when people bring their engines back for overhaul, TU-76 with this weak metal gets put right back in them correct?

A. Yes.

Q. And during that period of time the number of these cracks and the ruptures and the incidents and the accidents starts mount in, doesn't it?

A. Yes.

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Q. So, we know a third of these engines with this part in it with a bad metal are coming here to this country, correct?

A. Yes

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Q. You know anybody within your company, Turbomeca, whoever expressed a concern that due to the TU-76 experience that we'd better recall this because someone is going to get hurt or maybe killed?

A. No.

Meliet was in charge of the first two service letters (See timeline March, 1991 and December, 1992) sent to Turbomeca's customers. He made a conscious decision not to include information of in-flight shutdowns and failures in the letters, nor to advise helicopter owners of the safety situation involved with the modified TU-76 part. Safety, as far as Turbomeca was concerned, was not directly related to the cracks in the TU-76. "The in-flight deterioration of a TU 76 leads only to an in-flight shutdown of the engine. That's all." According to Turbomeca officers, an in-flight loss of engine power did not constitute an emergency, rather they simply stated "the pilot must be in a position to land this helicopter in safety."

At trial, Meliet agreed it would have been a large expense to have the TU-76 replaced, at Turbomeca's cost, in all Turbomeca helicopters world-wide.[10] In addition, Meliet admitted the impetus to extend the time between overhauls (See timeline May 1988) was for better sales, and that it would have been possibly bad for sales to have included the safety concerns connected with the TU-76. The Life Flight helicopter in this case had 2482 flight hours at the time of the accident, thus, had Turbomeca not extended the time between overhauls from 2000 to 2500, the accident in this case would have never occurred.

Alain Calemard, the vice-president for engineering and the technical manager of 670+ persons, including 150 engineers at Turbomeca, admitted the problem of cracking and disintegration around the hub was known to Turbomeca in June 1986, and that this problem led to in-flight failures of engines. He admitted that the cracking in the TU-76 developed after relatively few hours

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[10] Turbomeca officers, Dennis Nichols and Steven Ives both testified that a retrofit of the Replacement (TU-202) during a recall would have cost Turbomeca $17,000 per helicopter, with approximately 2850 helicopters world-wide using the defective TU-76.

of usage, and often occurred prior to "Turbomeca's prescribed limits" for overhaul service. He also said that in 1991, Turbomeca made mandatory for a customer to change another part of the engine -- but not this part. Only the French military was advised of the existence of the Replacement part.

The testimony at trial established that a manufacturer has a sales advantage if it can lengthen the time between overhauls, because not only does the helicopter owner pay for overhauls,[11] but the helicopter is out of service during that time. Calamard agreed that the May 1988 Turbomeca extension for overhaul from 2000 to 2500 hours (some two years after the 1986 Saviot report), was "significant", and came after ". . . we already knew of a number of failures of the TU 76 standard nozzle guide vane."

Based on Meliet and Calamard's testimony at trial, as well as the testimony of several other Turbomeca officers (see Point B *infra*), there was ample evidence from which the trial court could determine the submission of punitive damages was proper. Denial of the directed verdict and submission of punitive damages was not error. Point denied.

2) Remittitur of Damages

Turbomeca next alleges the trial court erred in denying its motion for a new trial and refusing to further remit punitive damages because the judgment: (1) remains grossly excessive, the product of misconduct by plaintiff's counsel; (2) constitutes an excessive fine under the Eighth Amendment; (3) denies the defendants due process; and (4) shocks the conscience of the court and demonstrates bias, passion and prejudice.

Generally, the decision to award punitive damages is peculiarly committed to the jury and trial court's discretion, and the

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[11] Dennis Nichols, president of Turbomeca Engine Corp., testified that an overhaul costs a helicopter owner, on average, between $90,000 and $140,000.

appellate court will only interfere in extreme cases. *Fust v. Francois*, 913 S.W.2d 38, 50 (Mo. App. 1995); *Young v. Jack Boring's, Inc.*, 540 S.W.2d 887, 898 (Mo. App. 1976). When a jury awards punitive damages, "both the trial court . . . and the appellate court review the award to ensure that it is not an abuse of discretion." *Call v. Heard*, 925 at 849. On appellate review, an abuse of discretion is established when the size of the punitive award is so disproportionate to the relevant factors that it reveals improper motives or a clear absence of the honest exercise of judgment. *Id.* at 849 (citing *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo.1966)). Only when the amount is manifestly unjust will appellate courts interfere with or reduce the size of a verdict. *Ball v. Burlington Northern R. Co.*, 672 S.W.2d 358, 363 (Mo. App. 1984).

Unfortunately no "punctilious prescription", no brightline test, exists to determine if a punitive damage award is excessive. *Hodges v. Johnson,* 417 S.W.2d 685, 690 (Mo.App. 1967). While an appellate court can look to other decided cases for guidance, they are often not determinative, for each case presents its own peculiar facts and circumstances which must be evaluated. *Id.* at 689; see also *Huffman v. Young*, 478 S.W.2d 332, 333 (Mo. 1972). It is because of the unique facts and circumstances of each case that no fixed mathematical relation, between the amount of actual damages and the amount of punitive damages, can exist. However, the amount of the punitive award must somehow be related to the wrongful act and the actual or potential injury resulting therefrom. *Call v. Heard*, 925 S.W.2d at 849. If the jury's verdict appears to be grossly excessive, outrageous, or the result of an honest mistake, so as to be obviously disproportionate to the injury shown, it is the duty of the court to modify the verdict. *Cates v. Eddy*, 669 P.2d 912, 920-21 (Wyo. 1983); 52 Am.Jur.2d 251.

Fortunately, juries, even in the most complicated cases, generally achieve good results. It is true, however, that no system is

perfect and on occasion a jury will reach an incorrect result in the eyes of all reasonable persons. "[A] jury is not free to award any sum it might choose, however large or small, whether from anger, sorrow, prejudice, mistake, or other improper cause" *Cates v. Eddy*, 669 P.2d at 920; 35 A.L.R.2d 308. Although considerable latitude is afforded the jury in arriving at a punitive award, the award must fall within a range, however large, that is acceptable under the Due Process Clause of the 14th Amendment. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994).

The Supreme Court of Missouri has held that aggravating circumstances damages in wrongful death cases are the equivalent of punitive damages and that due process safeguards are required. *Bennett v. Owens-Corning Fiberglas Corp.* 896 S.W.2d 464, 466 (Mo. banc 1995). Procedurally, the Due Process Clause of the 14th Amendment requires that adequate standards and controls be in place to prevent a punitive damage award from becoming an arbitrary deprivation of property.[12] *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-19 (1991). Substantively, a punitive award cannot be so "grossly excessive" in relation to the state's interests in punishment and deterrence that it enters into the "zone of arbitrariness" that violates the Due Process Clause. *BMW v. Gore*, 116 S.Ct. 1589, 1595 (1996). In *BMW*, the United States Supreme Court set out three guideposts for determining when a punitive damages award is so excessive as to violate a defendant's due process rights: (1) the degree of reprehensibility of the defendant's conduct, (2) whether there is a reasonable relationship between the punitive damages award and the harm that has either occurred or is likely to result from the defendant's conduct, and (3) the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases. *Id.* at 1598-99, 1602. *See also TXO Produc-*

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[12] Because Turbomeca does not argue on appeal that Missouri's standards and controls are so inadequate as to violate due process, this issue is outside the scope of this opinion.

tion Corp. v. Alliance Resources Corp., 509 U.S. 443, 459-460 (1993).

With these cases in mind, this court must both: (1) review the court's remittitur under the guideposts set forth in *BMW*, to determine if the punitive award remains grossly excessive so as to violate due process; and (2) review the remitted amount under the factors set out in Missouri's case law, to determine if the trial court's remittitur constitutes an abuse of discretion so as to require further remittitur or a new trial.

The constitutional inquiry begins by looking at the reprehensibility of the defendants' conduct. *BMW v. Gore*, 116 S.Ct. at 1599. Reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damage award. *Id.* A review of the trial testimony of Turbomeca's own officers reveals the degree of reprehensibility of the defendants.

Albert Ducrocq, the vice president of Turbomeca's "Airworthiness Department,"[13] admitted, like Meliet and Calamard, that the cracks in the TU-76 were due to "thermal fatigue," and that the rubbing of the hub against the turbine could cause an engine to sustain a power loss or shutdown in flight. He further admitted that "[t]he TU-76 doesn't achieve what we would want as a goal for [a] reliable part." In spite of this admission, Ducrocq then testified that an in-flight engine shutdown, caused by a defective TU-76, would not render the engine "unairworthy," but rather *might* create a "potential[ly] dangerous situation."

This obvious failure by Turbomeca's officers to recognize the severity of the situation was further illustrated by its repeated decision to not report in-flight engine failures to the helicopter owners, or the FAA, even though the in-flight failures warranted

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[13] Turbomeca's Airworthiness Department manages the "airworthiness" of all engines in service and reports to the FAA and its French equivalent, the DGAC.

critical internal reports. In response to questions about incidents not reported to the FAA or the DGAC, Ducrocq replied in one such case, where Turbomeca's internal report stated that a locking engine caused "a brutal whiplash in power," that the occurrence was merely "a malfunction," but ". . . not necessarily what we call an incident." Ducrocq was later asked about the May 26, 1993, Phoenix TV station incident (see timeline -- this was the second failure of this particular engine), and could not give a reason why this event, though causing an internal Turbomeca report, would not merit its listing in answer to the FAA inquiry.[14]

The following questions and answers are illustrative of Turbomeca's senior safety person's forthrightness, engineering acumen, and attitude toward the situation created by the modified part:

Q. And would you agree that if the pilot hears a loud bang coming from the engine compartment, it is prudent to make a precautionary landing?

A. This is left to his own judgment.

Q. Well, a loud bang from the engine compartment is not something that a pilot would normally hear within the normal flight parameters of the aircraft, correct?

A. I -- I have no idea what is a loud bang.

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[14] A third event not reported was the May 22, 1993 incident in Houston where the pilot heard a "loud bang," and made a precautionary landing. The fourth event not reported was the February 15, 1993 Virginia incident where, on the return flight, after the pilot heard a loud bang, power fell to 83 percent, and after another bang power went to 51 percent, prior to a forced landing. Again, this event was the subject of an internal report, but not included in the June report to the FAA. The same holds true for the very first accident involving the modified TU-76 where there was an in-flight failure in the Congo. (see timeline June-July 1985).

Q. . . . these engines are not supposed to create a loud bang in flight, are they?

A. I -- I know this engine running in test status, not on helicopter. So, I can't make any judgment about the noise it can produce once they're installed.

Q. Yes, sir, but you've never heard in the test situation a normal engine make a loud bang as described here, have you?

A. A loud bang in the test cell would be judged unnormal.

After several more questions Ducrocq then admitted the failure was due to the same problem that caused the accident in this case. Ducrocq also testified that many of the occurrences not reported to the FAA were reported to the French DGAC.

The reprehensibility of Turbomeca's conduct is unparallelled, considering that Turbomeca knew the TU-76 was defective and had discussed incidents resulting from the TU-76's failure internally, but did not find it necessary to either: inform the helicopter owners of the in-flight failures, notify the FAA of such incidents, or conduct a recall of the defective TU-76 part.

From the evidence it can easily be inferred that Turbomeca's decision-making was motivated solely by economics. The crash in this case, plus the two failures in February and July of 1994, prompted a Turbomeca meeting, in the summer of 1994, at the home office ". . . to ask ourselves, why does this keep happening." The following colloquy about the meeting is now recounted:

Q. And Mr. Ducrocq, in evaluating the situation, certainly you all discussed what other options had been in the past available to the company and what options were still available, true?

A. True.

Q. One of the options that had been available from the beginning with respect to [the] TU-76 was something we had discussed before and that is to plainly and simply remove it at the earliest opportunity, right?

A. That's a possible action.

Q. anyone at that committee express any regret or concern that that particular remedial action had not been taken before hand, sir?

A. Not that I remember.

In fact, according to the head of Customer Support, the decision was made in 1991 to offer the Replacement part only to certain owners, but no replacement would be installed in U.S. helicopters, "until the engine [was] taken to a repair facility."

With knowledge that there were 1300 to 1400 TU 76's in use worldwide, of which 200 were in use in the United States, the meeting of the executives resulted in a decision to not recall the parts and to wait until the scheduled overhaul to change the defective part. During overhaul the helicopter owner, rather than Turbomeca, is responsible for paying for any replacement parts. As a result, Turbomeca could avoid the cost of replacing the defective TU-76's during a recall, and instead could charge the owner for the replacement nozzle guide vane while overhauling the engine.[15]

[15] As discussed, *supra*, another indication that Turbomeca was motivated solely by economics was Turbomeca's decision, in spite of Nichols testimony that increasing the time between overhauls would increase the chance of TU-76 failures, to extend the length of time between overhauls in order to gain a sales advantage over competitors.

Steven Ives stated that the owner would pay for the retrofit of the New or Replacement part, unless Turbomeca of France consented. Somewhat contrary to who bore the cost of replacing the modified TU-76s, Ives then said that if the customer brought in a defective nozzle guide vane, Turbomeca had a policy by which it would pay for the retrofit. However, Ives knew of no service letter or of any correspondence sent by Turbomeca or Turbomeca Engine to any of its customers explaining that this policy existed.

In an attempt to justify the decision to not recall the TU-76, Ducrocq testified that a mandatory recall and replacement, was A. . . not necessary because the other actions which were put in place have proven efficient." However, he then admitted that had the replacement part been on the life flight helicopter in this case, Barnett would have been alive. The "other actions" that Ducrocq found to be "efficient" consisted of a series of service letters and bulletins sent to the helicopter owners to suggest that the owners listen for "rubbing noises" before and after shutdown of the engine. In reality, these service letters did little to inform the owners of the seriousness of the situation and nothing to inform them that the TU-76 was defective or that it could result in an in-flight engine failure.

Steven Ives, the manager of Technical Services for Turbomeca Engine, as well as several others who testified, have never personally heard the "rubbing" noises mentioned in the service letters and bulletins. In addition, none of Turbomeca's officers could state that any pilot, mechanic, owner, or accident report had ever mentioned hearing a rubbing noise.

Dennis Nichols, president of Turbomeca Engine,[16] testified that he became aware of the problem in 1991, the date of the first service letters, and that prior to May 27, 1993, North American customers were advised of the problems with the TU-76 through the service letters and bulletins. His testimony was as follows:

> Q. Well sir we can go through the service letters and service bulletins as much as you like, and I invite you to look at them. They're right in front of you. But did they ever tell the customer that the TU-76 nozzle guide vane is defective and dangerous and could result in in-flight power failure?

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[16] Turbomeca Engine supports and maintains all Turbomeca aircraft in North America, about one third of the world-wide fleet.

A. I don't believe that I have read words of that nature in any of the documents.

Q. But that's true isn't it?

A. It's inappropriate for me to -- I'm not a technical expert. I -- I can't say that.

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Q. Well, do you know, as president of the corporation, whether it's true or not that the TU-76 nozzle guide vane is a -- defective component?

A. Would you state the question again, please?

Q. Do you know as president of Turbomeca Engine Corporation whether the TU 76 nozzle guide vane is a defective component?

A. Yes.

Q. And did you know that it was defective before May 27, 1993?

A. I--I can't say.

Nichols agreed that one possibility to have corrected the problem as quickly as possible would have been for the company to recall the engines and retrofit them with the Replacement (TU-202) at Turbomeca's expense. He also admitted that waiting for an overhaul, or increasing the time between overhauls, would increase the chance of TU-76 failures.

Q. . . . [N]ow the reason that . . . Turbomeca . . . took the position that we're going to wait until overhaul time and take the chance of failure in the interim of some of these part, is one of cost, isn't it?

A. I agree with that statement.

In July, 1994, the time of the Nichols deposition, he was asked if any decision had been made on the remaining aircraft for a recall, and he answered, . . . "there's been no decision."

Steven Ives investigated the crash in this case, as well as the one the day before in Phoenix and gathered the documents for the National Transportation Safety Board, ("NTSB") which had requested the number of previous failures. Like Nichols, he testified there were still engines "out there" flying with the defective TU-76 part. According to the service bulletins, it would take but two hours of a mechanic's time to install the Replacement on the Life Flight helicopter. Neither Ives nor anyone else at Turbomeca Engine told any owner or operator, including Rocky Mountain, that there was a defective part in these engines that created a potentially deadly situation.

Neither Ives, nor anyone else at Turbomeca Engine, questioned Turbomeca about TU-76 problems world wide. It was only after the accident in this case, coupled with the requests of the two U.S. agencies, that a comprehensive compilation was prepared. Ives admits to thirteen world-wide accidents or forced landings, all caused by the TU-76 part, occurring prior to the accident in the case at bar. He admitted this was an important number, and that it did not correspond with the figure of six priors as reported by Turbomeca to the FAA and NTSB.

Carey Brown, Turbomeca Engine's director of customer support, and Ives' superior, testified as follows,

"Q. Mr. Brown, when did you first become aware of any . . . problems . . . associated with the . . . TU-76?

A. I don't know when I first became aware . . .

Q. Was it before the crash of Life Flight?

A. I was not aware of any ongoing problems . . .

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I still do not myself know that the nozzle was the -- problem."

Then when asked what he did when problems were discovered, he said, "I did -- basically, when the various service letters came out, we simply administered those service letters."

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Q. And you did not have any knowledge as to either the severity or widespread nature of the TU-76 problem; is that correct, sir?

A. That's correct.

Q. Do you have a mechanical background, Mr. Brown?

A. Yes, I do.

Q. Do you have enough mechanical background to know that a failure of the TU-76 nozzle guide vane could lead to a catastrophic crash?

A. No, I don't.

Q. That's not something within your knowledge as the director of the customer support department?

A. No, it's not.

***

Q. Did Turbomeca Engine Corporation ever notify its customers about a potential problem with the TU-76 design, sir?

A. I am still confused by the question.

Q. Well, did you or did you not send out any information or alert to your customers that these things were cracking and had the potential to kill or seriously injure people?

A. No.

Brown had not read the NTSB report, nor was he familiar with anything specific pertaining to the TU-76 problem.

Q. Well, with all of that in mind, Mr. Brown, I'm wondering as the director of technical support for this entire corporation, what is it that you do?

A. I manage the department.

Given the testimony of Turbomeca's own officers, it is not difficult to understand why a large punitive damage amount was awarded. Turbomeca's conduct was unquestionably reprehensible.

The second indicium of a grossly excessive punitive award is its ratio to the actual and potential harm to the plaintiff. *Id.* at 1601. The trial court's remittitur of $87.5 million in punitive damages, and to $25 million in compensatory damages exhibits a ratio of just over 3:1. For only illustrative purposes, it is noted the Supreme Court of the United States previously approved a ratio of 526:1 as not being in violation of the Due Process Clause of the 14th Amendment in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993). While such a ratio might not be proper here, it is evident there is no pre-set or magic ratio of actual to punitive damages. This court concludes that the trial court's remittitur evinces a "reasonable relationship" between actual and punitive damages given the nature of Turbomeca's conduct. *BMW v. Gore*, 116 S.Ct. 1589, 1601 (1996).

Finally the third factor in determining whether a punitive damage award violates the Due Process Clause is the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases. *BMW v. Gore*, 116 S.Ct. at 1599. Given the testimony of Turbomeca's officers and the other evidence presented at trial, it appears that the punitive

damage award given was the only real way to deter the conduct of Turbomeca. The evidence has demonstrated that Turbomeca's decisions were solely based on economics. In addition, it could not reasonably be said that Turbomeca did not have adequate "notice" of the severity of the sanction that might befall them as a result of their conduct. The aforementioned testimony reveals this fact.

To supplement the requirements set out above for the imposition of punitive damages, the courts of this state have identified a variety of factors, a nonexclusive list, that should be considered in determining whether the trial court abused its discretion in not further remitting the jury's punitive award. Several factors may be considered, including: (1) the degree of malice or outrageousness of the defendant's conduct, *State ex rel. St. Joseph Belt Ry. Co. v. Shain*, 108 S.W.2d 351, 356 (Mo.1937); (2) aggravating and mitigating circumstances, *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo. 1966); (3) the defendant's financial status, *Id.* at 724.; (4) the character of both parties, *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 662 (Mo.App.1991); *Holcroft v. MKT RR Co.*, 607 S.W.2d 158, 164 (Mo.App.1980); (5) the injury suffered; *Moore v. Missouri-Nebraska Exp., Inc.*, 892 S.W.2d 696, 714 (Mo.App.1994); (6) the defendant's standing or intelligence, *Id.;* (7) the age of the injured party, *State ex rel. St. Joseph Belt Ry. Co.*, 108 S.W.2d at 356; and (8) the relationship between the two parties. *Call v. Heard*, 925 S.W.2d at 849 (citing *Moore v. Missouri-Nebraska Exp., Inc.*, 892 S.W.2d 696, 714 (Mo. App.1994)). Each of these factors has been addressed in the discussion above.

It is a fact, a sad fact gleaned from *all* witnesses, that this accident resulted from the defect in the modified TU-76. Had the replacement TU-202 been installed, the module that used a different metal, there would have been no "metal fatigue" leading to the failure. What Turbomeca's own records, and indeed the early conclusions of their engineers show, is the

fatigue or stress was brought on by a flight, followed by a short wait, and then a return trip (see time line incident February, 1990) -- exactly the scenario for air rescue or air transport of fragile patients in need of emergency care. Turbomeca advertised the use of this helicopter for emergency medical transport. Turbomeca's reliance on experienced pilots being able to autorotate to a forced landing in such unexpected emergency situations as loss of power, with such a cargo, is void of any support and totally unrealistic.

Turbomeca's post-accident under-reporting of prior failures of the modified TU-76, however, pales in comparison to the lack of forthrightness to its customers. Turbomeca's failure to be candid with owners about the well-documented dangers of their product, was evidenced by the diversionary tactic of directing persons to listen for rubbing sounds. The company always seemed to be motivated by cutting costs, saving money and increasing sales -- all at the expense of the unlucky owners. The TU-76 was modified to save money. The New and Replacement parts took longer to implement for some customers than to build the entire original engine because of "being blocked" by its Commercial Sales Department. Its laissez-faire attitude of never notifying, even post-*Letz* and *Barnett,* owners of the lethal, undetectable dangers inherent in the modified TU-76, along with its net worth and financial ability justifies the imposition here of substantial punitive damages.

While this court concludes that the remitted judgment of $87.5 million entered by the trial court is excessive, the court finds in light of the relevant factors and considering all the evidence, and giving deference to this court's unanimous opinion this day in *Letz*, that $26.5 million is the amount to be rendered against Turbomeca as punitive damages in this case. Considering the extreme reprehensibility of Turbomeca's conduct and the other relevant factors, this court does not believe this punitive award,

as now remitted, is grossly excessive as to violate the Due Process Clause of the 14th Amendment.

THE BARNETTS' CROSS APPEAL -- THE STATUTORY CREDIT

The relationship between this case and Letz, and the reason both decisions are being handed down the same day, is exemplified by the cross-appeal of the plaintiffs. The over-arching question here is whether, under Section 510.263.4, a trial court may grant a punitive damage credit in a second case, for punitive damages awarded, but not yet paid, in a prior case, that arise out of the same incident, when the prior case is on appeal?

The facts vis-a-vis a credit are as follows. The Barnett trial started in June of 1995. In *Letz,* which was tried first, an amended judgment was entered in August 1995. Turbomeca subsequently appealed and the case was heard by this court en banc. As the reader will remember, there was no bifurcation of compensatory and punitive damage awards in *Letz.* After the verdicts in Barnett, Turbomeca timely filed for a punitive damage credit under 510.263.4. Since the *Letz* verdict was not bifurcated, the Barnett trial court determined one-half of the $70 million judgment was punitive, and accordingly, applied a $35 million credit to the remitted Barnett punitive damage award. The Barnetts' primary basis for appealing Turbomeca's punitive damage credit is that no punitive damages award has been paid by Turbomeca in *Letz.*

The confusion caused by this point is due to the language of the statute, which simply does not envision the situation in this case --where there are separate trials, one soon after the other, with the same facts and the same aggravating circumstances, and both cases pend on appeal. Section 510.263.4 states in pertinent part:

> Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded

> by the jury as punitive damages be credited by the court with *amounts previously paid* by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based. At any hearing, the burden on all issues relating to such a credit shall be on the defendant and either party may introduce relevant evidence on such motion. Such a motion shall be determined by the trial court within the time and according to procedures applicable to motions for new trial. If the trial court sustains such a motion the trial court shall credit the jury award of punitive damages by the *amount* found by the trial court to have been *previously paid* by the defendant arising out of the same conduct and enter judgment accordingly. (Emphasis Added).

Paraphrased, the other pertinent portions of this subsection require the trial court to deny the credit if it finds: 1) that the defendant failed to establish entitlement to a credit or, 2) the conduct in the second case was not the same conduct on which the imposition of punitives was based on in the prior case, or 3) that the defendant unreasonably continued [its] conduct after acquiring actual knowledge "of the dangerous nature of such conduct . . .[17] Section 510.263.4.

The Barnetts ask for a strict construction of the statutory language, and argue that the statute requires that after thirty days following entry of judgment if the prior judgment has not been paid, then no credit may be allowed in the second suit.[18]

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[17] It appears that Missouri's statutory credit mechanism is unique. Georgia at one time had a credit legislation. Offering a credit is an alternative to caps on punitive or aggravating awards. The Missouri General Assembly should not be criticized for allowing, but not mandating, a credit to avoid redundant punishment.

[18] Section 510.263.4 requires the post-trial motions to be filed within the time for filing a motion for new trial. Rule 78.04 states that such time will not exceed 30 days after entry of judgment.

Somewhat surprisingly, there are very few cases that have interpreted Section 510.263.4. This may, in part, be due to the numerous pitfalls and snarls encountered with implementation of the statutory credit. For example, consider what happens if no appeal is taken in *Barnett*, and *Letz* is appealed and results in a punitive award other than $26.5 million. Such a situation, when interpreted under Section 510.263.4, would result in confusion because Barnett would then become the first judgment paid. As a result, *Letz*, which then becomes the second judgment, could not receive a credit for Barnett since the defendant in *Letz* did not apply for a credit as required by the statute -- within 30 days after entry of judgment. The defendant in *Letz* never applied for a credit because it was the first case tried and there was no reason to ask for a credit at that time. This possible scenario would unwittingly force a defendant to illogically apply for a credit that does not exist at the time it is sought, and may never come into existence. In addition, even if Letz resulted in a higher punitive award than Barnett, the defendant could not, under the statute, obtain a credit for the amount paid in Barnett.

As has been stated earlier in this opinion, the purpose of punitive damages is to inflict punishment and deter similar misconduct and not to allow punishment over and over again for the same previous conduct. Punitive damages are not to reward plaintiffs, but to punish and deter defendants. *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo.banc 1990). To allow excessive financial punishment invites a constitutional due process violation. In *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 231 (Mo. App. 1988), a case involving numerous plaintiffs who were damaged by the defendant's noxious emissions, the court upheld the defendant's liability for actual and punitive damages, but reversed only for the purpose of adjudicating the proper amount of damages. The court in *Elam* said: "It is a desideratum of the statute [S. 510.262.4] that a defendant not be required to pay redundant punitive damages based on the same conduct."

The long and short is that the statutory credit under Section 510.262.4 just won't adjust to these facts where two cases pend and are ripe for adjudication in one court at the same time. The statute's language allows a credit to be given only for "amounts previously paid." Rather than attempt to make the statute fit by allowing a larger judgment in Barnett and a "conditional" credit when and if *Letz* is paid, the court feels the overall effect of both cases and the remitted amounts of punitive damages in *each* case, when combined, reach the proper result and supply the relief that the credit statute envisions and the United State's Supreme Court has enunciated: that total punitive damages, where there are successive suits, will not go beyond due process limits in punishment and deterrence. As the Appendix shows, Turbomeca will have to pay a total of $26.5 million in punitive damages in each for *Letz* and Barnett. These amounts, when considered together are deemed sufficient to judicially accomplish a total result that is not excessive, nor unduly harsh by repeated punishment. The trial court's granting of a credit on the cross-appeal is reversed.

The wrongful death statute allows the jury to consider both aggravating and mitigating circumstances. Section 537.090. Missouri courts have long held that mitigating circumstances are a factor appellate courts must consider when remitting the trial court's judgment. *Moore v. Missouri Nebraska, Inc.* 892 S.W.2d at 714 (Mo App. 1994); *Beggs v. Universal CIT Credit Corp.* 409 S.W.2d at 724 (Mo. 1966). In reviewing the jury's verdict, the trial court, as well as the appellate court, must consider both previous and pending judgments against the defendant as mitigating circumstances when the prior judgment was for the same conduct as the conduct at issue before them. The burden is on the defendant to establish that previous or pending punitive damage judgments against the defendant result from the same conduct at issue in the present case. The defendant is certainly in the best position to know of previous or pending judgments against them.

By giving consideration to other judgments upon a request for remittitur, the appellate court can in the spirit of Section 510.263.4, effectuate the goal of the credit statute -- to prevent repetitive punitive awards for the same conduct.

The court realizes trial judges may be put in an unenviable position where a credit is timely requested by a defendant and other cases involving judgments against the same defendant are still pending. However, under these types of circumstances, where the statute does not apply, judges should attempt to use discretion in affording relief to keep punitive awards within due process limits. The legislature is encouraged to immediately revisit Section 510.263.4.

Except for the points on the excessive amounts of compensatory and punitive damages, all of Turbomeca's points are denied. The trial court's grant of a $35 million credit is reversed. If the Barnetts agree, within fifteen days of this court's mandate, to remit the total judgment against both defendants for compensatory damages to $3.5 million, and of punitive damages to $26.5 million, this judgment shall stand as of the date of the original date of judgment. Otherwise, that judgment is reversed and remanded for a new trial on damages.

Harold L. Lowenstein

All Concur.

APPENDIX

	Letz		Barnett	
	Actual	Punitive	Actual	Punitive
TRIAL COURT				
Jury's verdict:	combined	$70 m	$175 m	$175 m
Judgment after *Barnett* Trial Ct's Remittitur:			$25 m	$87.5 m
Barnett Trial Ct's damages allocation to determine Credit[19]:	$35 m	$35 m		
Trial Ct's Punitive Damage Credit:				$35 m credit
Net Judgment after Trial Ct's Credit:			$25 m	$52.5 m
APPELLATE ACTION				
Mandate Amount after the Court's Remittitur	$2.5 m	$26.5 m	$3.5 m	$26.5 m

Total Payment by Turbomeca under *Letz* and *Barnett* decisions: $59 million

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[19] Because the *Letz* trial occurred prior to the Supreme Court's decision in *Barnett*, the *Letz* jury did not render separate compensatory and punitive damage verdicts. As a result, the *Barnett* trial court, in order to determine the punitive damage credit under Section 510.263, attempted to determine the portion of the combined $70 million verdict in *Letz* that constituted punitive damages.

APPENDIX B

IN THE SUPREME COURT OF MISSOURI

No. 80559
W.D. No. 53655

January Session, 1998

Kyong Ju Barnett, et al.,
Respondents-Appellants,
vs. (TRANSFER)
La Societe Anonyme Turbomeca France
a/k/a/ Turbomeca, S.A., and Turbomeca Engine Corporation,
Appellants-Respondents.

Now at this day, consideration of Appellants-Respondents' application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 1998, and on the 24th day of March, 1998, in the above entitled cause.

Give under my hand and seal of said Court, at the City of Jefferson, this 24th day of March, 1998

/s/ Thomas F. Simon, Clerk

APPENDIX C

IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI AT KANSAS CITY

CASE NO.: CV93-24644

DIVISION: 8

KYONG JU BARNETT, et al.,
PLAINTIFFS

V.

LA SOCIETE ANONYME TURBOMECA FRANCE
A/K/A TURBOMECA, S.A., et al.,
DEFENDANTS.

FINAL JUDGMENT

Pursuant to the Mandate of the Missouri Court of Appeals, Western District and, further, in that Plaintiffs have timely consented to the remittitur in accordance with that Court's Opinion of November 25, 1997, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT final judgment in favor of Plaintiffs be and is entered and affirmed in the amount of $3.5 million ($3,500,000.00) in compensatory damages and $26.5 million ($26,500,000.00) in punitive damages and Plaintiffs shall have and recover pre- and post-judgment interest in the amount of $10,554,745.00[1] as of April 28,

[1] Pre-judgment interest at 9% from 8/23/94 to 7/20/95 (date of verdict and entry of original judgment) is based upon 332/365 days times 9% or 8.1863% and results in pre-judgment interest of $2,455,890.00 (8.1863% times $30,000,000.00). Thus, given that the remitted judgment of $30 million "shall stand as of the date of the original date of judgment," the judgment on 7/20/95 totals $32,455,890.00. Post-judgment interest at 9% simple interest on that judgment yields $2,921,030.14 per year. Accordingly, as of April 28, 1998 the total judgment with pre- and post-judgment interest is $40,554,745.00 with interest accruing at $8,002.82 per day.

1998 for a total Judgment of $40,554,745.00 and interest on the total judgment in the amount of $8,002.82 shall gather day-to-day until the judgment has been satisfied in full.

As set forth in this Court's prior Order of February 20, 1996, the allocations of compensatory damages, interest, and aggravating circumstances (punitive) damages are to be calculated in accordance with the formula contained in the confidential Agreement Among All Plaintiffs dated July 7, 1995, which Agreement has been filed *in camera* and previously approved by the Court. As ordered at that time:

> "In the event the amount of the judgment is revised in any way, or, if for any reason the amounts payable to Plaintiffs upon the judgment are different than the amount thereof, then such revised judgment or amount payable to Plaintiffs shall be re-allocated among the Plaintiffs in accordance with the formula contained in the aforesaid Agreement Among All Plaintiffs dated July 7, 1995, which remains in full force and effect and binding upon all Plaintiffs."

The Mandate of the Missouri Court of Appeals, Western District, enforcing that Court's decision of November 25, 1997 is precisely such an "event" requiring re-allocation of the judgment among the Plaintiffs by this Court.

Accordingly, based upon the formula previously approved by this Court and following the Mandate of the Missouri Court of Appeals, Western District, the original judgment becomes $32,455,890.00 and is re-allocated among the Barnett Plaintiffs as follows:

Kyong Ju Barnett —	$13,666,548.00	(.4211)
Jessie Morgan Barnett —	$ 6,833,274.00	(.21055)
Mia Kyong Barnett —	$ 6,833,274.00	(.21055)

James Barnett, Sr. —	$ 2,561,397.00	(.0789)
Wanda Barnett —	$ 2,561,397.00	(.0789)
Total	$32,455,890.00	(1.0000)

Each Plaintiff shall collect post-judgment interest at the statutory rate of nine percent (9%) per annum until satisfaction based on the foregoing allocations. The percentages following the above allocations represent that Plaintiff's percentage of the judgment. That percentage will be applied, respectively, to compensatory damages, post-judgment interest, and aggravating circumstances (punitive) damages

The allocation of the $3.5 million in compensatory damages among the Plaintiffs is as follows

Kyong Ju Barnett —	$1,473,850.00
Jessie Morgan Barnett —	$ 736,925.00
Mia Kyong Barnett —	$ 796,925.00
James Barnett, Sr. —	$ 276,150.00
Wanda Barnett —	$ 276,150.00
Total	$3,500,000.00

The allocation of the $8,098,855.00 in post-judgment interest among the Plaintiffs is calculated based on each Plaintiff's receiving his or her full share of the statutory nine percent (9%) post-judgment interest as follows:

Kyong Ju Barnett —	$ 3,410,271.00
Jessie Morgan Barnett —	$ 1,705,133.00
Mia Kyong Barnett —	$ 1,705,133.00
James Barnett, Sr. —	$ 639,154.00

Wanda Barnett —	$ 639,154.00
Total	$ 8,098,855.00

As indicated, interest shall accrue daily in the amount of $8,002.82 until this judgment is satisfied and additional interest shall be allocated based on the percentage set forth above.

The allocation of the $26.5 million in aggravating circumstances (punitive) damages among the Plaintiffs is as follows:

Kyong Ju Barnett —	$11,159,150.00
Jessie Morgan Barnett —	$ 5,579,575.00
Mia Kyong Barnett —	$ 5,579,575.00
James Barnett, Sr. —	$ 2,090,850.00
Wanda Barnett —	$ 2,090,850.00
Total	$26,500,000.00

Accordingly, the final judgment is allocated among the Plaintiffs, *en toto,* as follows

Kyong Ju Barnett —	$17,076,819.00
Jessie Morgan Barnett —	$ 8,538,407.00
Mia Kyong Barnett —	$ 8,538,407.00
James Barnett, Sr. —	$ 3,200,556.00
Wanda Barnett —	$ 3,200,556.00
Total	$40,554,745.00

The Court at this time also will address, make findings of fact upon, and rule on the Judgment Lien timely filed by the State of Missouri pursuant to V.A.M.S. § 537.675. That statute provides as follows:

> "Fifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses shall be deemed rendered in favor of the State of Missouri."

This Court has previously granted defendant Turbomeca's Motion to add the State of Missouri as a party of this action. The Court does find that the State is a necessary and indispensable party to proper resolution of this action.

Therefore in giving effect to this Final Judgment and pursuant to the dictates of § 537.675, it is thereby necessary that this Court review, take evidence upon and consider the amount of the attorneys' fees as entered into between the respective Plaintiffs and their counsel and the litigation expenses.

As to Plaintiffs Kyong Ju, Jessie, and Mia Barnett, the Court has heard testimony of attorney Mike Thiessen, a tax partner with the Husch & Eppenberger Law Firm. Mr. Thiessen has been the tax advisor to Julia, Jessie, and Mia Barnett from the outset of this litigation. It is Mr. Thiessen's testimony that he has reviewed the litigation expenses incurred by the law firm of Robb & Robb LLC and find all such expenses to be directly related, reasonable, necessary, and appropriate to the litigation.

The Court has heard testimony from Plaintiff Kyong Ju Barnett and Plaintiff Jessie Barnett asking this Court to approve the attorneys' fees of Robb & Robb LLC, as contracted, as well as the litigation expenses. The litigation expenses were reviewed in detail and expressly consented to and approved by the above Plaintiffs. In her capacity as Next Friend for the minor child Mia Barnett, Kyong Ju Barnett also sought approval of the attorneys' fees and litigation expenses.

Notwithstanding the above, in the final analysis it is for this Court alone to determine the reasonableness of attorneys' fees and this Court is considered to be an expert on these matters according to Missouri law and procedure. It should be noted that

this lawsuit was tried before this Court and involved a lengthy four-week trial. The matter involved extensive discovery, sophisticated use of evidence, and trial skills. Given the Plaintiffs' counsel's work during discovery, trial, post-verdict pleadings and, especially, the work on appeal, this Court finds that the attorney's fees as contracted for as between Plaintiffs Kyong Ju, Jessie, and Mia Barnett and the law firm of Robb & Robb LLC are clearly fair, reasonable, and appropriate and this Court hereby

APPROVES specifically the attorneys' fees as contracted for by Plaintiffs Kyong Ju Barnett, Jessie Barnett and Mia Barnett with the Law Firm of Robb & Robb LLC and hereby directs payment of those attorneys' fees as contracted by these Plaintiffs.

NOTWITHSTANDING the above-referenced testimony on litigation expenses, the Court has maintained an ongoing knowledge and awareness of the litigation expenses incurred by Robb & Robb LLC in this matter. Such cases are not handled inexpensively given their complexity. The Court has *in camera* reviewed a complete itemization of Robb & Robb LLC's litigation expenses including all documentary support and hereby makes the express finding that those litigation expenses are hereby approved as fair, reasonable, and necessary expenditures in connection with this litigation and the above Plaintiffs Kyong Ju, Jesse, and Mia Barnett, are hereby ordered to pay such litigation expenses out of this Final Judgment.

Plaintiffs James and Wanda Barnett, Sr. have withdrawn their Motion to Dismiss the State of Missouri as a Party to this Action or, Alternatively, to Determine that the State Has No Interest in a Final Judgment.

THEREFORE, having made the above findings, this Court is now in position to determine the proper award of punitive damages owed to the State of Missouri by Kyong Ju, Jesse and

Mia Barnett and James and Wanda Barnett, Sr. pursuant to § 537.675.

Following the deduction of attorneys' fees and pro rating the litigation expenses among Plaintiffs Kyong Ju, Jessie, and Mia Barnett, the net punitive damages awarded to these Plaintiffs following the statutorily required deduction of fees and expenses is as follows:

Kyong Ju Barnett	Jessie Barnett	Mia Barnett
$3,944,204.00	$1,972,103.00	$1,972,103.00

The Court has reviewed and does hereby approve the attorneys' fees and litigation expenses as among James and Wanda Barnett, Sr., Slagle, Bernard & Gorman, P.C. and Duke W. Ponick, Jr. Following the deduction of attorneys' fees and prorating the litigation expenses among Plaintiffs James Barnett, Sr. and Wanda Barnett, the net punitive damages awarded to these Plaintiffs following the statutorily required deduction of fees and expenses is as follows:

James Barnett, Sr.	Wanda Barnett
$797,995.00	$797,995.00

Pursuant to the operation of § 537.675, the State of Missouri is entitled to its full fifty percent (50%) share of this Final Judgment awarding punitive damages to the above-referenced Plaintiffs. The Court recognizes the position of the Attorney General that it is entitled to fifty percent of the entire punitive damages award plus interest, however, this is contrary to the specific terms of § 537.675 and the Court's ruling follows the precise requirements of that statute.

Accordingly, the Turbomeca defendants are hereby ORDERED by the Court on this 28th day of April, 1998 to satisfy this final judgment in full by tendering in open court unto Plaintiffs and the State of Missouri certified checks upon a

United States FDIC-insured Federal Reserve wire-transfer bank as follows:

> $22,657,073.00 payable to: "Kyong Ju Barnett, Jessie Barnett and Robb and Robb LLC;"
>
> $7,552,356.00 payable to: "Kyong Ju Barnett, As Next Friend for Mia Barnett, and Robb & Robb LLC;"
>
> $5,603,117.00 payable to: "James Barnett, Sr., Wanda Barnett, Slagle, Bernard & Gorman, P.C., and Duke W. Ponick, Jr.;" and
>
> $4,742,199.00 payable to "State of Missouri."

The funds for the minor, Mia Barnett, shall be deposited into the duly-created conservatorship for which full bond has issued.

Upon tender of the checks as heretofore set out, Plaintiffs and their counsel are ordered to execute Satisfactions of Judgment which shall be received and acknowledged by defendants and their counsel in open court.

FURTHER, PLAINTIFFS SHALL HAVE AND RECOVER ALL COURT COSTS.

IT IS ORDERED THAT if defendants do not or are not prepared to satisfy this final judgment in full on this date then Plaintiffs' Motion for Execution of Judgment on Appeal Bond shall be sustained forthwith and Plaintiffs shall have and collect upon that judgment against St. Paul Fire & Marine Insurance Company.

LET EXECUTION ISSUE.

Dated: April 28, 1998

/s/ Lee E. Wells
LEE E. WELLS
CIRCUIT COURT JUDGE
DIVISION 8

/s/Barbara Eager
Barbara Eager, Clerk
Division 8